IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 938.

DAVID L. HAMMOND AND OTHERS, PLAINTIFFS IN ERROR,

vs.

ANN E. GORDON AND OTHERS.

IN ERROR TO SUPREME COURT OF MISSOURI.

MOTION TO DISMISS OR AFFIRM.

J. B. HENDERSON,
For Defendants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Defendants move the Court to dismiss the writ of error in this case or to affirm the judgment of the supreme court of Missouri for the reasons following:

FIRST.

In the judgment of said State court no Federal question was involved or decided against the plaintiffs.

The suit was an action of ejection brought by plaintiffs in error, in which was tried the question of title to land.

The evidence showed, and each party admitted, that the United States had parted with its title to the land in controversy long prior to the institution of the suit.

The plaintiffs claimed under conveyances made by the heirs of one Samuel Hammond, who died in 1842. The defendants claimed under a sheriff's deed, dated in 1823, made by virtue of a judgment and execution against said Hammond. The whole question of title, in the judgment of the Missouri court, turned on the validity of the sheriff's sale.

It is submitted, therefore, that this is a question purely of State law and not reviewable in this Court. It matters not what other questions may have been considered or decided by the lower court, the ground above stated, and on which the decision was placed, is broad enough to maintain the judgment, and therefore the writ of error should be dismissed.

SECOND.

If, however, in the opinion of this Court, a question of Federal law or right was decided by the State court against the plaintiffs, it is insisted by defendants that such question was properly decided by said State court, and its judgment should be affirmed for the reasons set forth in the brief of defendants, which has been duly served on plaintiffs, as required by the rules of this Court.

J. B. HENDERSON,
For Defendants.

FILED
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JAMES H. McKENNEY,
CLERK

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STATEMENT.

This is an action of ejectment originally brought in the circuit court of St. Louis, in Missouri, on June 13, 1874.

The petition or declaration conforms to the statutes of that State and alleges that the plaintiffs on June 1, 1874, were entitled to the possession of the land sued for, and that the defendant on the day thereafter entered into the premises and unlawfully withholds from the plaintiffs the possession thereof, to their damage, &c.

The premises sued for were described as United States survey No. 2500, located under New Madrid certificate No. 161, issued to one Joseph Hunot or his legal representatives. The defendant denied possession of the whole tract, but admitted possession of a lot of about 11 acres, No. 46, as numbered on Peter Lindell's second addition to St. Louis, which lies within the said survey.

Among the several defenses pleaded by the defendant the seventh is as follows:

"7. And defendant, for further answer, says that plaintiffs, in order to recover in this case, rely on the legal title alleged to have been vested in one Samuel Hammond in 1823, which title they, the said plaintiffs, claim has passed to them by inheritance and by subsequent conveyances to them from the heirs of said Hammond.

"Defendant says that whatever title, legal or equitable, was then or at any time vested in said Samuel Hammond was sold on the 8th day of October, 1823, under and by virtue of a certain judgment and execution by John K. Walker, the sheriff of St. Louis county, Missouri, and the same was, on November 4, 1823, by him, the said sheriff, conveyed, as provided by law in such cases, to Richard Relfe and Beverly Chew, the purchasers at said sheriff's sale, and thereupon the said Relfe and Chew became vested with all the title previously owned in said land by Samuel Hammond.

"And defendant says that on the 20th day of March, 1840, the said Relfe and Chew conveyed, by general warranty deed, all their right in said land thus acquired to Peter Lindell, and this defendant claims by inheritance from said Peter Lindell, deceased, to his heirs and from them by mesne conveyances to this defendant, and it says that Peter Lindell, from the date of said deed of Relfe and Chew, in March, 1840, held actual, adverse, open, notorious, and hostile possession of said lands against the said Hammond and the said Relfe and Chew and against all others under and by virtue of said deeds from Sheriff Walker and from Relfe and Chew up to October, 1861, when he died, and that thereafter his (the said Lindell's) heirs held like possession of said land up to the time of their conveyance thereof, since which time this defendant has in the same manner held like adverse possession thereof as the legal representative of said Lindell, claiming from him as its predecessor, and successively from said Peter Lindell and under said sheriff's deed to this date.

"Plaintiffs by replication deny that the title of said Hammond was sold on the 8th day of October, 1823, or on any other day by virtue of a judgment and execution against said Hammond by Sheriff Walker or by any one, and deny

that there ever was any valid sheriff's deed to Relfe and Chew or to any one else to said land."

A jury was waived and the trial of facts had before the court, and on the trial the plaintiffs, to show title to the land in themselves, gave in evidence:

1. A Spanish concession to said Hunot, made in 1802, for 800 arpents of land, lying in New Madrid county, Missouri.

2. A deed of conveyance by said Hunot, dated in 1810, conveying said land in New Madrid to one Vandenbenden.

3. A deed of conveyance by said Vandenbenden, dated in 1815, conveying said land to one Rufus Easton.

4. A presentation of the claim for confirmation thereof, made to the old board of commissioners in 1811, and the rejection of the claim by said commissioners.

5. The report of Frederick Bates, recorder of land titles for the Missouri Territory, dated November 1, 1815, recommending the claim for confirmation.

6. The act of Congress of April 29, 1816, confirming said claim.

7. New Madrid certificate No. 161, issued by Recorder Bates, dated August 12, 1816, whereby Joseph Hunot or his legal representatives were entitled to locate 480 acres, the balance under the limitations of the act of Congress, on any of the public lands of the Territory of Missouri, the sale of which was authorized by law.

8. An application to the surveyor general by Rufus Easton, "as the legal representative of Joseph Hunot," to locate said certificate on certain lands near St. Louis, in township 45, No. 7 east, dated June 16, 1818.

9. A copy of survey made by the deputy surveyor, Joseph C. Brown, dated June 23, 1819, and numbered 2500, in satisfaction of said certificate No. 161.

10. A return of said survey by the surveyor general of Illinois and Missouri to the recorder of land titles for the State of Missouri on January 8, 1833, and the approval and record of said survey by said recorder on the 2d day of February, 1833.

11. A deed of conveyance by Rufus Easton and wife to Samuel Hammond, dated September 29, 1823, by which they conveyed to said Hammond, pursuant to the conditions of a certain bond, executed by the said Rufus Easton to the said Samuel Hammond and James J. Wilkison, dated 3d September, 1818, the whole of the land located by New Madrid certificate No. 161, "except the 234 acres of land of the said tract conveyed to William H. Ashley, as will appear by deed of 1819, recorded in the recorder's office of St. Louis county."

12. Evidence to show that there was, and is, no deed on record in said county by which Rufus Easton conveyed, or attempted to convey, to said Ashley any part of said land.

13. A certified copy of a deed dated July 10, 1819, by said Easton and wife to William Stokes, conveying by metes and bounds 234 acres of the land located by said certificate No. 161. The tract so conveyed covers the southern part of said location of the Hunot certificate, and calls for a corner of the Samuel Hammond land.

14. The act of Congress approved June 30, 1864, entitled an act concerning certain locations of lands in the State of Missouri, which act relinquishes to Joseph Hunot or his legal representatives all interest, if any, of the United States in and to said survey No. 2500.

15. Evidence to show that the land sued for lies in that part of said survey No. 2500 which was conveyed by said Easton to Samuel Hammond by deed of September 29, 1823.

16. Evidence to prove the death of Samuel Hammond in 1842, and to show the names and residences of his heirs in 1874, when this suit was instituted, and tending to show that during the period of the rebellion they resided within the Confederate States.

17. Certain deeds of conveyance by the heirs of Samuel Hammond, dated in 1873 and thereafter, purporting to convey to J. L. D. Morrison and E. C. Smith and others for $1,330 two-thirds of the whole Hunot location; also mesne conveyances between these and other parties, tending to show that whatever of title remained in Samuel Hammond at his death was at the time the suit was instituted vested in the plaintiffs. In other words, the plaintiffs in error derive their claim to the land through conveyances made in 1873–'4, by persons professing to be the descendants of Samuel Hammond, to whom they paid, as shown by the deeds, the sum of $1,330 for 240 acres of land, lying in the city of St. Louis, worth from five thousand to twenty-five thousand dollars per acre.

The defendants, to show title out of the plaintiffs and in themselves, offered in evidence:

1. The certified copy of a sheriff's deed dated November 4, 1823, signed by John K. Walker, sheriff of St. Louis county, Missouri, duly acknowledged on the same day, and recorded on January 27, 1824, in which it is recited that a writ of execution was issued from the clerk's office of the supreme court of Missouri, for the third judicial district thereof, dated May 23, 1823, on a judgment recovered in said court by Richard Relfe, Beverly Chew, and Mary Clark against Samuel Hammond for the sum of $6,877.43½; that

said execution was directed to the sheriff of St. Louis county, in said State of Missouri, commanding him that of the goods and chattels, lands and tenements, of said Samuel Hammond the said sheriff cause to be made the said sum, with costs and charges; that he duly return said execution and render to the plaintiffs therein their damages and costs; and further reciting that by virtue of said execution the said sheriff did, on the 5th day of September, 1823, levy upon and seize all the right, title, and interest, estate and property of the said Samuel Hammond in and to certain real estate described in said deed and in the return of said sheriff, among which is the following, to wit:

"A tract of land containing 240 arpents, more or less, bounded on the south by land of Gratiot and Phillipson, on the west by land of John P. Cabané, and on the east by land of William Stokes and others, and includes the big spring known by the name of Hammond spring;" and further reciting that after having advertised the sale of said land agreeably to law, as will appear by a copy of the advertisement, which is made a part of said deed, he did, on the 8th day of October, 1823, agreeably to the advertisement aforesaid, expose to public sale for cash, at the court-house door, in the city of St. Louis, during the sitting of the St. Louis circuit court, all the right, title, and interest, estate and property of said Samuel Hammond in and to the said tract of land, and that at said sale Beverly Chew and Richard Relfe, being the highest and last bidders for said tract of land, became the purchasers thereof at and for the sum of $100; and reciting further that "in consideration of the payment of said sum, and by virtue of the authority in him vested by law, he, the said sheriff, did and does thereby transfer and assign to said Beverly Chew and Richard Relfe, their heirs and assigns forever, all the right, title, and interest, estate and property of him, the said Samuel Hammond, in and to the above-described tract of land, that he might or could sell as sheriff."

This deed is executed in the form required by law, and was recorded January 27, 1824.

2. A certified copy of the record and proceedings of a suit instituted by Richard Relfe, Beverly Chew, and Mary Clark in the St. Louis circuit court, in the year 1818, against Samuel Hammond, in which a judgment was rendered in favor of the plaintiffs and against said Hammond, at the August term, 1819, which said judgment was affirmed on writ of error by the then superior court of Missouri on the 22d day of May, 1823, on which judgment the execution was issued, as aforesaid, under which the land of Hammond was sold as hereinbefore stated.

The judgment in the circuit court, rendered in 1819, recited as follows: "Therefore it is considered that the said Richard Relfe, Beverly Chew, and Mary Clark recover against the said Samuel Hammond their damages aforesaid (amount stated), in form aforesaid by the court assessed, together with their costs and charges by them about their suit in this behalf expended, and that they have thereof execution."

The judgment in the supreme court, rendered May 22, 1823, is as follows: "And now, at this day, come the parties aforesaid, by their respective attorneys aforesaid, and the court here, being sufficiently advised of and concerning the premises, consider that the judgment aforesaid, in form aforesaid rendered, be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said Richard Relfe, Beverly Chew, and Mary Clark recover against the said Samuel Hammond their costs and charges by them about their defense in this behalf expended, and that they have thereof execution."

The execution issued on May 28, 1823, recited that whereas the plaintiffs, "at our supreme court for the third judicial circuit, recovered against Samuel Hammond the sum of

$6,877.43½, which to the said Relfe, Chew, and Clark was adjudged for their damages which they sustained as well by reason of the non-performance of certain promises and undertakings as for their costs and charges by them about their suit in this behalf expended, as appears to us of record; these are therefore to command you," &c.

The sheriff's return on the writ is:

"Made on this execution by the sale of the property described in the enclosed advertisement the sum of $480, which satisfies of the debt $427.77, after deducting the costs. Richard Relfe and Beverly Chew were the purchasers. October 8, 1823."

3. Evidence to show that at the time of the sheriff's sale, in 1823, Charles Gratiot and Joseph Phillipson owned all the land adjoining the Hunot survey on the south; that Charles P. Cabanné then owned all the land contiguous to said survey on the west, and that Wm. Stokes then owned the Ann Camp tract, which constituted a part of the eastern boundary of said location and survey of Joseph Hunot.

4. The testimony of witnesses who knew the Hammond spring in 1823, and what was known as the Hammond tract of land, about three miles west of St. Louis, and bounded as hereinbefore stated, and tending to show that the land, as advertised and sold, and as described in the sheriff's deed aforesaid, was at the time of the sale known in the neighborhood as the land of Samuel Hammond, and tending to identify it as the land purchased by Hammond from Rufus Easton, and constituting a part of the Hunot location and survey No. 2500, and that said Hammond was at the time of said sale and for several years previous had been in the actual possession of said lands.

5. A deed of conveyance from Joseph Hunot and wife to Peter Lindell, dated December 5, 1834, purporting to convey to said Lindell and his heirs and assigns his title and interest, if any, in the Hunot survey No. 2500.

6. A letter of attorney by Richard Relfe and Beverly Chew authorizing John O'Fallon, of St. Louis, Mo., to sell and convey, in his discretion, all lands owned or possessed by them in the State of Missouri, dated October 19, 1838.

7. A deed of conveyance of Richard Relfe and Beverly Chew by John O'Fallon, their attorney-in-fact, conveying to Peter Lindell for $1,500 their right, title, and interest in and to the land described in Sheriff John K. Walker's deed, hereinbefore recited, giving the same description as contained in the said sheriff's deed, and further describing it as "being a part of a location of 480 acres made by Rufus Easton as the legal representative of Hunot, and more particularly described by reference to the certificates of Joseph C. Brown, formerly sheriff of St. Louis county, recorded in Book K, p. 397," &c. This deed is dated March 20, 1840.

8. The act of Congress "making further provisions for settling the claims to land in the Territory of Missouri," approved June 13, 1812 (2 U. S. Stat., p. 748). The second section of this act provides that all village lots, outlots, or common-field lots of St. Louis, not claimed by private individuals or held by the town of St. Louis as commons, if not reserved by the President of the United States for military purposes, "shall be, and the same are hereby, reserved for the support of schools" in the said town or village of St. Louis.

9. The act of Congress of January 9, 1831 (4 U. S. Stat., 435), and the act of Congress of June 15, 1864, relinquishing to St. Louis all the right, title, and interest of the United States in and to all town or village lots, outlots, and common-field lots, which were reserved by the act of 1812 for the support of schools, and that the same be sold and disposed of by the schools in such manner as may be directed by the legislature of Missouri.

10. An act of the legislature of Missouri, dated February 13, 1833, incorporating the board of president and directors of the St. Louis public schools, and authorizing said board to sell and dispose of all school lands owned or to be owned by said board. (2 Vol. Terr. Laws, 1824 to 1836, p. 379, sec. 1 and 9.)

11. A deed of conveyance by the board of president and directors of the St. Louis public schools to Peter Lindell, dated August 30, 1845, purporting to convey to said Lindell all the right and title of said board in and to any lots or lands covered by or lying within the limits of survey No. 2500, in the name of Joseph Hunot or his legal representatives. For further authority of the school board to convey this land, see statement and brief in the case of Block and others *vs.* Hammond and others.

12. A certified copy, together with the plats of the survey of certain lots in the Grand Prairie common fields of St. Louis, made by Deputy Surveyor Wm. H. Cozens under instructions of 1846 and 1855, and the proceedings of the Commissioner of the General Land Office and of the Secretary of the Interior in 1856 and 1857, leading to the final approval and recording of said surveys in 1857, and tending to show that according to said surveys, as thus approved and recorded, the lot of land sued for lies within the outboundaries of the Grand Prairie common fields of St. Louis.

13. The testimony of divers witnesses to prove the actual and adverse possession of the Hunot location, including the land in controversy, by Peter Lindell and those claiming under him from about 1840 down to the institution of plaintiffs' suit.

14. The death of Peter Lindell in 1861 and the partition and division of his lands among his heirs, under which the

lot in controversy was assigned and conveyed to Ann E. Gordon, one of said heirs.

15. A chain of conveyances, all for valuable considerations, from Ann E. Gordon and husband down to the defendant, the College of Christian Brothers, by which the title of said Ann E. in said land, if any, became vested in the said defendant.

16. Defendant then offered in evidence a judgment obtained by the United States against Samuel Hammond in the district court of the United States for Missouri on September 9, 1824, for $26,680.35.

17. An execution issued on said judgment to the marshal of the United States, dated October 9, 1824, and a return thereon made on March 9, 1825, by H. Dodge, marshal, as follows: "The within-named Samuel Hammond has no lands and tenements, goods and chattels, in my district that I can find whereon to levy and satisfy this execution or any part thereof. Neither is the body of said Hammond to be found in my district."

18. The return of an execution with a capias clause issued to the marshal of the district of South Carolina against said Hammond on said judgment, as follows:

"UNITED STATES *vs.* SAMUEL HAMMOND.

"Judgment, September 9, 1824, $26,680.35.

"Marshal's office, South Carolina district.

"CHARLESTON, *February* 7, 1826.

"I do hereby certify that of the goods and chattels, lands, etc., of Samuel Hammond I could find none on which to levy the damages and costs set forth in a certain execution issued in behalf of the United States by the district court of Missouri against Samuel Hammond. I do furthercertify

that, in obedience to the mandate of said execution, I have caused the said Samuel Hammond to be arrested, and he is now confined in the gaol of this district, where he will remain till discharged by law.

"(Signed) MORTON A. WARING, *Marshal.*"

19. The copy of a petition, dated February 21, 1826, made by Samuel Hammond to the President of the United States to be discharged from imprisonment under the insolvent debtor laws of the United States, in which he alleges that "he hath no other property than that in the States of Missouri and in Arkansas and in Illinois, a schedule of which is annexed to this (his) petition and that he is willing and ready to assign the same to the United States."

20. A copy of the schedule of property attached to said petition, in which there is no claim of ownership or mention of claim by said Hammond to any part of the land included in the New Madrid location of Joseph Hunot.

21. A copy of the order of discharge of Hammond, made by the President of the United States, dated March 2, 1826.

22. A copy of the deed of Samuel Hammond to the United States, dated March 13, 1826, in which, after reciting the judgment, execution, arrest, and imprisonment, as aforesaid, he states that he had "petitioned the President of the United States for my (his) discharge upon my (his) assigning, which I (he) offered to do, all the property, real and personal, of which I (he) was possessed or in which I (he) had any interest, as set forth in a schedule annexed to the said petition, a copy of which schedule is also annexed to this deed of assignment."

And thereupon he conveys to the United States all the property described in said annexed schedule.

The defendants then asked the court to make the following declarations of law in this case, which were given:

First. The title on which plaintiffs must recover, if they recover at all, is that which was vested in Joseph Hunot or his legal representatives, either by the patent of the United States, dated August 30, 1859, conveying to them survey No. 2500, with certain reservations and exceptions therein specified, or by the act of Congress of June 30, 1864, by which the United States relinquished its right, title, and interest in and to said survey No. 2500 to Joseph Hunot or his legal representatives.

Second. The title under which plaintiffs claim is founded upon the deed of conveyance made by Rufus Easton to Samuel Hammond, dated September 29, 1823, by which he sold and transferred to said Hammond a part of the New Madrid location, made by said Easton as the representative of Joseph Hunot, it being admitted that the lot in dispute is covered by the land described in said deed. But the court declares it to be the law of this case that whatever of right, title, or interest in said land was acquired by Samuel Hammond under the said deed of Easton to him was divested from Hammond and his heirs and transferred to Richard Relfe and Beverly Chew by the deed of John K. Walker, sheriff of St. Louis county, dated November 4, 1823.

Third. The description of the land as conveyed in said sheriff's deed, taken in connection with the evidence adduced tending to identify it as the land of Samuel Hammond, so conveyed by Easton in the New Madrid location of Joseph Hunot or his legal representatives, together with the subsequent admission of Hammond in 1826 that he had no interest in said land, is sufficiently definite and certain to pass the interest of Hammond in said land to the pur-

chasers, Relfe and Chew, the grantees in the said sheriff's deed.

Fourth. If the deed of conveyance from Joseph Hunot to Joseph Vandenbenden, made in 1810, for the old Spanish concession in the district of New Madrid, and the deed of Vandenbenden to Rufus Easton for the same land, made in 1815, followed by the confirmation of said concession or grant in 1816, the application to exchange said land under the act of 1815, the issue of New Madrid certificate No. 161, the application of Easton to locate said certificate on the land in dispute, the survey of said land and return thereof in 1819, the transmission of said survey to the recorder of land titles in January, 1833, the approval and record of said survey by the recorder in February, 1833, the issue of a patent certificate by said recorder for said survey, and the issue of the patent by the United States, dated August 30, 1859, were sufficient in law to vest the legal title to the land in controversy in Samuel Hammond as the legal representative of Joseph Hunot, then such legal title enured to the said Relfe and Chew as the assignees of said Hammond under the judgment, execution, sale, and sheriff's deed read in evidence by defendants.

The judgment was for the defendant, from which the plaintiffs appealed to the supreme court of Missouri.

On a hearing in the latter court, the judgment of the circuit court was affirmed.

The grounds upon which this affirmance is placed will appear from the following extracts from the opinion of the supreme court:

Opinion of Supreme Court of Missouri.

"From the foregoing statement it will be seen that all the parties to this suit claim under Samuel Hammond, the defendants (plaintiffs) through the heirs of Hammond, and

the plaintiffs (defendants) under the sheriff's deed. The title is with the defendants, unless the sheriff's deed divested Samuel Hammond of his interest in the land.

* * * * * * *

"In this case, Easton procured a certificate of location, made application to the surveyor for a location of it on the land, and had a survey made by the proper officer; which survey and plat were certified to the surveyor general in June, 1819. In the meantime he executed the title bond, dated the 3d September, 1818, to Hammond for 240 acres, and Hammond took possession of the land. On the 10th July, 1819, Easton conveyed the residue of the tract to Stokes. Easton had then signified his intention in a proper form to appropriate the land in satisfaction of his certificate. He was pursuing the course specified by the act of Congress to bring about and perfect the exchange of lands. It was because of these steps taken that Stokes and Hammond were induced to purchase the land. As against Stokes and Hammond would he (Easton) be heard to say he had no interest in the land? Surely not. It is perfectly clear that this bond and the deed gave Hammond and Stokes the right to go on and perfect the location as it was subsequently perfected. When perfected they would become the legal owners of their respective parcels of land so purchased from Easton. This was a valuable right acquired by them to and in the land by reason of the deeds, and it was none the less a valuable right because the Government could have appropriated the land to other purposes at any time before the plat and survey were filed with the recorder of land titles. Easton acquired a right in the land which he had a right to and did transfer to Hammond and which Hammond could have transferred. As Hammond had an interest which he could lawfully part with, it follows that this interest was subject to sale under execution under the (State) statute before mentioned. That interest passed by the sheriff's deed to Relfe and Chew, and by their deed to Lindell. When the patent was issued it related back at least to the time when Easton made his application to the deputy surveyor to have the New Madrid certificate located on the land. The doctrine that when several proceedings are essential and necessary to a deed or patent the last will be held to take effect by relation on the date of the first is well settled. Though a fiction of the law, it will be applied

when the ends of justice require it to be applied and the rights of third persons are not prejudiced. (Lessee of Frack *v.* Spencer, 21 How., U. S., 228; Shepley *v.* Cowan, 91 U. S., 337; Jackson *v.* McMichael, 3 Cowan, 75; Callahan *v.* Davis, 90 Mo., 78; 3 Wash. on Real Prop.) The claim that the doctrine of relation can have no application to a New Madrid location prior to the return of the survey to the recorder is, in our opinion, not well founded and not supported by any of the authorities cited to prove that proposition. Right and justice call for the application of the rule in this case, and no reason is seen why it should not be applied."

* * * * * * *

"The deed from Easton to Hammond states that it was made in consideration of $1,583 paid by Hammond and pursuant to the conditions of a certain bond executed by Easton to Hammond and Wilkinson dated 3d September, 1818. Hammond therefore held a title bond for the conveyance of the land as far back as 1818, which was before the date of the judgment under which the property was sold. Did this title bond create in the vendee an interest in the land which was subject to sale under execution? The answer must be in the affirmative. The statute in force at that time provides that the 'sheriff's deed' shall be effectual for passing to the purchaser all the real estate and interest which the debtor had or might lawfully part with in the lands at the time the judgment was rendered."

1 Ter. Laws, p. 120, sec. 45.

The plaintiffs have brought the case into this Court from the Missouri supreme court by writ of error.

Motion to Dismiss or Affirm.

On this state of facts the defendant moves the Court to dismiss the plaintiffs' writ of error or affirm the judgment of the supreme court of Missouri for the reasons following:

First. The record fails to present any Federal question decided against the plaintiffs by the supreme court of Missouri; and—

Second. Should this Court hold that a Federal question is involved in the judgment of the supreme court of Missouri, the defendants insist that it was properly decided by said court.

Brief and Argument.

The writ of error must be dismissed unless it appear that, in the judgment of the supreme court of Missouri, there was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against its validity; or unless there was drawn in question the validity of a statute of, or an authority exercised under the State of Missouri, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; or unless some title, right, privilege, or immunity was claimed by the plaintiffs in error under the Constitution or treaties or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed by the plaintiffs under such Constitution, treaty, statute, commission, or authority.

The Constitution of the United States (art. 3, sec. 4) provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The only pretense on which error can be claimed is that the judgment of the Missouri court in some way conflicts with this provision of the Federal Constitution and interferes with the disposition of its lands by the Government.

If the decision sustaining the sheriff's deed be correct, not only Hammond but all the heirs of Hammond are precluded from setting up any interest in the land, and plaintiffs have no standing in this Court.

"Where the supreme court of a State in rendering a judgment decides a Federal question, and also decides against the plaintiff in error on an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

Hopkins *v.* McClure, 133 U. S., 380.

I.

Both plaintiffs and defendants here claim under the same patent. No right claimed under the Constitution or laws of the United States is here drawn in question. The only controversy was and is whether, under the laws of Missouri, the title which has emanated from the United States passed from one person to another under a deed executed in accordance with the State law. That is a subject for State and not Federal jurisdiction. This Court adopts the local law of real property, as ascertained by State decisions, whether those decisions are based on the construction of the local statutes or form a part of the unwritten law of the State.

Authorities.

In Romie *v.* Casanova, 1 Otto, 379 (error to supreme court of California), both parties claimed title from the city of San José. This court said:

"The title of the city was not drawn in question. It is said that depended on the treaty of Guadaloupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, but this does not appear in the record. Even if it did, the case would not be different, for both parties admit the title of the city, and their litigation extends only to the determination of the rights which they have severally acquired under it."

In McStea *v.* Friedman, 2 Otto, 723, it is said:

"No Federal question was involved in the decision of the supreme court (of California). The city's title was not

drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the 'constitution or any treaty or statute of or commission held or authority exercised under the United States.'"

Citing—

4 Saw., 180.
3 Wood, 61.

"The Government has no interest in contests between persons claiming *ex post facto* the grant, nor is it charged to decide between such claimants."

Castro *v.* Hendricks, 23 How., 438 (16 : 576).

In a Mexican claim when the Government no longer claims the land in question to be public land the right of the United States to contest the case ceases, and this court will not entertain jurisdiction to determine to which of two private claimants it may belong.

U. S. *v.* Morillo, 1 Wall., 706 (17 : 626).

The plaintiff claims that the Government conveyed the land to Samuel Hammond as the legal representative of Joseph Hunot. This defendant does not dispute the fact, but says that Hammond's title was divested by a sheriff's sale made under the laws of Missouri, and that by the several conveyances read in evidence that title is now vested in him, the defendant. The rulings of the State circuit court and the opinion of the supreme court of Missouri distinctly place their decisions and judgments on the validity of the sheriff's deed and its sufficiency to pass Hammond's title to Relfe and Chew. As was said by this Court in Cook Co. *v.* Calumet and C. Canal and D. Co., 135 U. S., 635, "there was no decision against a claim or title asserted under the United States, but simply that the county did not obtain title under the grant of the State; that the act of 1852 imposed a positive duty on the county to transfer such title as it acquired to the purchaser from the United States, and

that where lands had been bought in good faith from the United States the title to such lands did not become vested in the county, but passed to the purchaser under his entry. This construction by the State court of the laws of the State is controlling in the premises."

See Gormley *vs.* Clark, 134 U. S., 338.

It matters not that the plaintiffs may have raised a Federal question on argument.

"Although a Federal question may have been raised in the State court, yet if the case was decided in that court on grounds not involving a Federal question, but broad enough to sustain the decision, this Court will refuse to entertain jurisdiction."

See Henderson Bridge Co. *v.* City of Henderson, 141 U. S., 679.
Kreiger *v.* Shelby R. Co., 125 U. S., 39.
De Saussure *v.* Gaillard, 127 U. S., 216.
Hale *v.* Akers, 132 U. S., 554.
Hopkins *v.* McLure, 133 U. S., 380.
Johnson *v.* Risk, 137 U. S., 300.

Finally, the defendant insists that this Court has passed directly upon the question presented in this case, in the case of Hammond and others *v.* Johnston, receiver, &c., 142 U. S., 73 (opinion by the Chief Justice).

The record in this case is identical in every respect with that in Johnston's case, the land in both cases being a part of the Hammond tract.

In the latter case this Court said:

"Plaintiffs in error contended that, at the time when Easton conveyed to Hammond, and when the sheriff sold the land under the execution, the title to the land was in the United States. The court conceded that the legal title was in the United States, but held that there was an equitable interest in Easton and those claiming under him, which was sub-

ject to sale under execution, and that, under the statutes of Missouri, the sheriff's deed was effectual in passing to the purchaser all the estate and interest which the debtor had at the time of the judgment. And the court used this language: 'Under the view we have taken of the sheriff's deed, and the force and effect we have given to it, the title is in the defendants, and the judgment will be affirmed. This result as to the effect of the sheriff's deed rendered it unnecessary to pass upon the other questions presented by the record, but we have ruled upon them in order that there may be no embarrassment to either party in a review of this judgment in the Supreme Court of the United States.'

"It is well settled that where the supreme court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

II.

If, however, this Court should be of opinion that the decision of the Missouri court involves a Federal question, that question was properly decided and the judgment should be affirmed.

Easton, being the owner of the New Madrid land, made his bond to convey 240 acres of it to Hammond on September 3, 1818. On September 29, 1823, Easton, for a valuable consideration and "pursuant to the conditions" of his bond to that effect, conveyed the land in fee to Hammond. This same land, by metes and bounds, was sold by the sheriff on October 8, 1823, and the title under the sheriff's deed is now held by defendants in error.

In the case of Lamb *v.* Davenport, 18 Wall., 307, it is held that contracts made by actual settlers on the public lands concerning their possessory rights are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired and though

the Government is under no obligation to either of the parties in regard to the title, unless they are forbidden by some positive law.

"The purchaser by such a contract acquired an equitable right to the land, which would be enforced when the legal title was obtained."

See Stark *v.* Starr, 94 U. S., 477.

On the 20th May, 1836, Congress passed an act providing "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall enure to and become vested in the heirs, devisees, or *assignees of such deceased patentee as if the patent had issued to the deceased person during life.*"

The formula "or his legal representatives" embraces representatives of the original grantee in the land, such as assignees or grantees, and leaves the question open to inquiry in a court as to the party to whom the patent should enure.

Hogan *v.* Page, 2 Wall., 605 (17: 854).

Carpenter *v.* Rannells, 19 Wall., 138 (22: 77).

A Spanish claim to land, if confirmed by the commissioners, has the effect of a confirmation to the legal representatives of the person to whom the original concession was made, where the commissioners passed upon nothing but the merits of the original concession.

Connoyer *v.* Schaeffer, 22 Wall., 254 (22: 827).

Under the act of 1836 a patent issued upon a Spanish claim which had been confirmed to the claimant or his legal representatives vested the legal title in him, and

enured by way of estoppel to his grantee and those who claimed by deed under him.

Stoddard *v.* Chambers, 2 How., 284 (11: 269).
Landes *v.* Brant, 10 How., 348 (13: 449).
Easton *v.* Salisbury, 21 How., 426 (16: 181).

"A tract of land subject to entry when purchased and paid for ceased to be the property of the United States or subject to its disposal. The legal title is then held by the United States for the benefit of the purchaser, and on proper application the Government is bound to issue its patent to the purchaser."

Cornelius *v.* Kessell, 128 U. S., 456 (32: 482).

The subsequent grant of lands in a Spanish claim to the heirs of the claimant who had executed a mortgage thereon by act of Congress of 1836 carried the equities of the mortgagee with the legal title, of which he took the benefit.

Massey *v.* Papin, 24 How., 362 (16: 734).

The case of Burke *v.* Marshall, 6 How., 285, was a sale of a possessory right to two lots in the town of Dubuque. This Court said:

"At the time of this transaction the United States had not yet offered the land on which the town of Dubuque was situated for sale; but, notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements under the expectation of the grant of the right of pre-emption from the Government, or, at least, that they could complete their title by purchase from it when the lots should be offered for sale. These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the form usual for passing a title in fee."

"The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is

acknowledged; but subject to these well-known principles parties in possession of the soil might make valid contracts even concerning the title predicated upon the hypothesis that they might thereafter lawfully acquire the title except in cases where Congress had imposed restrictions on such contracts."

Lamb *v.* Davenport, 18 Wall., 307.
Sparrow *v.* Strong, 3 Wall., 97.
Myers *v.* Croft, 13 Wall., 291.
Thredgill *v.* Pintard, 12 How., 24.

"The rule has always been that covenants for title worked an estoppel; but this rule has been carried farther, and it is now established that where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies."

French *v.* Spencer, 21 How., 228.

The same doctrine has always been applied by this Court to conveyances by sheriff deeds of equitable or inchoate interetss in lands.

In the case of Landes *v.* Brant, 10 How., 348, it appeared that one Dodier was the grantee of a Spanish concession which, previous to confirmation, he conveyed to Clamorgan in 1807. In 1808 Sarpy recovered a judgment against Clamorgan in the district court of St. Louis, on which an execution was issued, and Clamorgan's interest was sold by the sheriff and purchased by McNair. After these proceedings the board of commissioners confirmed this claim, in 1811, and a patent was issued thereon in 1845 to Clamorgan or his legal representatives.

The chief question before this Court was whether the sheriff's sale and deed conveying the equitable interest con-

stituted the purchaser a legal representative of Clamorgan. On that question this Court said:

"'But there is another consideration equally conclusive in favor of the sheriff's deed in the present instance.' Clamorgan died in 1814, and by his will devised his lands to his illegitimate children, under whom the plaintiff Landes claims title. In 1845 a patent issued purporting to convey to Clamorgan, in fee simple, the land in dispute. According to common law the patent was void for want of a grantee; and to supply this defect Congress had passed a general law (May 20, 1836) declaring as follows (here citing the statute of 1836 in regard to patents). Of course the assignee, by *bona fide* conveyance, would come in before a volunteer, such as an heir or devisee. Here the assignee of the devisee is suing the alienee of the devisor. The patent issued in 1845 is the ultimate and conclusive evidence of title in this instance, as the board of commissioners had no power to grant and communicate the fee held by the United States. Their decision was final to this extent—the officers of the Government were bound to award the patent to Clamorgan without any further action on the part of Congress. But this adjudication does not stand on the footing of cases where the commissioners were ordered to report and Congress reserved the power to confirm the report, and thus to grant the fee by act of Congress. In such cases this Court has held that Congress had granted the fee, and that no patent was required as a further assurance of title. To what description of assignee, then, did the title enure according to the act of 1836? Necessarily to one claiming not the legal but the equitable title existing when the patent issued, and in him the legal title is vested by the patent. The same rule was applied in the case of Stoddard *v.* Chambers, 2 How., 316.

"In 1800 a concession was made to Mordecai Bell; in 1804 Bell conveyed to James Mackay, and in 1815 Mackay conveyed to Amos Stoddard, whose heirs were the plaintiffs.

"The claim was filed with the board in 1808, and in 1836 it was confirmed to Mordecai Bell 'or his legal representatives.'

"This Court held, on the foregoing state of facts, that 'when under the act of 1836 the report of the commission-

ers was confirmed to Bell and his legal representatives the legal title vested in him and enured by way of an estoppel to his grantee and those who claimed by deed under him.' There was no covenant for title in either the assignment from Bell to Mackay or from Mackay to Stoddard, each being quitclaim assignments.

"So again in the case of Bissell *v.* Penrose, 8 How., 317, the same principle was maintained. In August, 1800, Tillier filed his claim with the board and asked a confirmation for 800 arpents, and it continued before the different boards, sitting at St. Louis, until 1836, when it was confirmed by Congress.

"In 1818 Tillier assigned his claim to Penrose, and in 1820 Penrose assigned his claim acquired from Tillier to Mary B. and Anna Penrose, who were the plaintiffs in the ejectment suit, and who recovered the land under their deed of 1820.

"In *every* case where this Court has been called on to investigate titles where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee and his heirs or devisees in the same manner as if he had been vested with the legal title at the date of the conveyance. We are, therefore, of the opinion that the sheriff's deed made to McNair in 1808 must be supported on this ground also."

The holder of a register's certificate of the purchase of a lot in the town of Dubuque lawfully acquired and issued by the register under the two acts of July 2, 1836, and March 3, 1837, has such an equitable estate in the lot before the issuing of the patent as will subject the lot to sale under execution under the statutes of Iowa.

Levi *v.* Thompson, 4 How., 17.

The brief of the attorney in that case is as follows:

"The legislature of the Territory of Iowa could confer no authority on the sheriff to sell the property in question because the title was yet in the United States and had not

passed to Levi and Thompson at the time of the sheriff's sale."

And to sustain the contention he cited Bagnell *v.* Broderick, 13 Peters, 436, and Wilcox *v.* Jackson, 13 Peters, 498 *et seq.*

This Court said:

"This right to the fee and a patent in this case gave to Levi and Thompson that equitable right to the land under the certificate of the receiver of the land office which the law of Iowa has made subject to execution for the satisfaction of judgments."

Again:

"The fee continues in the United States until the issue of the patent, but the right to the fee was in the purchasers, and they were entitled to a patent for the land unless there was some legal objection by the United States against issuing it, of which this Court is not advised."

The effect of a sheriff's deed conveying such inchoate titles is specifically set forth in the case of Landes *v.* Brant, already cited, in the following language:

"The proceeding was not void, but passed to the purchaser at execution sale all the title that would have passed from Clamorgan had he made a quitclaim deed to McNair, the purchaser. * * * That such was the force and effect of a regular sheriff's deed under the local laws of the then Missouri Territory is not open to question, nor is it controverted; and the only remaining consideration in this branch of the case is whether the sheriff's deed can be set up as a defense at law, notwithstanding the confirmation and patent, both of which are of subsequent date to the sheriff's sale and deed."

The court thereupon proceeded to declare the conveyance by the sheriff to be a valid title, in the following language:

"The confirmation of 1811 and the patent of 1845 must be taken to relate to the first act—that of filing the claim in

1805. On this assumption intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and passed that title to the alienee, and on this ground the deed made by the sheriff to McNair is valid."

And this brings us to the doctrine of relation as uniformly defined and explained by this Court.

The Doctrine of Relation.

In Stark *v.* Starrs, 6 Wallace, 418, this Court said:

"When, in fact, the patent was issued it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

In Shepley *v.* Cowan, 91 U. S., 337, it is said:

"The party who takes the initiatory steps in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claimants."

This latter case is absolutely conclusive of the case now at bar. It fully explains the language of the Hot Springs cases, which were decided at the same term of court and reported in the next volume of reports. The court refers to the cases of Frisbie *v.* Whitney, 9 Wall., and the Yosemite Valley cases, 15 *id.*, 77, and says that an inchoate right obtained by settlement or otherwise is not such a vested interest as to deprive Congress of the power to dispose of the property; that Congress could at any time reserve such lands from sale for arsenals, fortifications, or other public uses, and that a settlement on public land, accompanied even by improvement, "did not confer upon the settler any right in the land *as against the United States* or impair in any respect the power of Congress to dispose of the land *in any way it might deem proper.*"

The court is particular to use the words "*as against the United States*" and to italicize them in its opinion. In a subsequent part of the opinion the court says:

"But whilst, according to those decisions, no vested right as *against the United States* is acquired until *all* the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the *commencement* of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The court continues:

"When these prerequisites (steps necessary to obtain title) were complied with the settler for the first time acquired a *vested interest in the premises*, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers and ultimately to a patent from the United States. Until such payments and entry the acts of Congress gave to the settler only the privilege of pre-emption in case the lands were offered in the usual manner—that is, the privilege to purchase them in that event in preference to others."

The question in this case (Shepley *v.* Cowan) was whether Chartrand's title related back to his original settlement on the land, so as to antedate the inception of the title of the State.

The court expressly says that this mere right of preference, as against third persons, did not rise to the dignity of an equity; "that Congress might have then withdrawn the land from settlement or pre-emption and granted it directly to the State of Missouri or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs, as against the United States, would have been invaded by its action; but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the

earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs."

Hence it is that the court holds that when the title finally emanated from the Government it related back, as against third persons, not to the time of payment of the purchase-money and entry with the local land officers, but to the period of earliest settlement—a period when Chartrand was even denied the right to enter and had no title, legal or equitable, *as against the Government.*

The court makes the bare settlement the initiatory step, and then says:

"The party who takes this step, *if followed up to a patent,* is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claimants."

If the patent of 1859 enured to Easton, as Hunot's legal representative, when issued it related back to the first necessary step taken by Easton in the acquisition of the title. The Supreme Court has specifically defined those necessary steps. The first was taken August 12, 1816, in the issue of the certificate. The second was taken when Brown located the certificate on the specific land subsequently conveyed by the patent. The third was taken when, on June 23, 1819, Brown returned his survey to the surveyor general, which survey segregated the soil from the public domain. Either of these acts is sufficient to support the doctrine of relation, as repeatedly construed by the Supreme Court, and vests in these defendants all that Easton or Hammond ever held or can hold in the disputed land.

In Washburn on Real Property, vol. 3, page 308, it is said:

"There are cases where the transaction is not complete and effectual in itself to convey title to lands, but by being connected with other acts or transactions, as parts of the one under consideration, it became effective by the relation

which the law creates between them, whereby they are made to partake of the character of a single and integral act. It may be difficult to classify these cases; but a reference to a few of them will give a general idea of what is here meant. One of these would be the case of a sale of premises made by a sheriff upon execution, but no deed delivered until a subsequent period, during which the judgment debtor had died. When a deed is given it has a relation back to the sale, and is considered as then taking effect, and its validity is not affected by the intermediate death of the debtor."

Washburn, in his Treatise on Real Property, referring to the case of Landes against Brant, says:

"The title in question was an imperfect one in the original claimant under the Spanish government, and a creditor of the one holding this title had seized his title on execution; and subsequently to this the United States confirmed the title to the original claimant. It was held that, by relation, he was the real owner when the sale was made, and, consequently, the purchaser under the sheriff's sale held the land against the devisees of the original claimant."

The only limitation placed by the courts upon the doctrine of relation is that it shall not work injustice to the rights of innocent third parties acquired between the events which it is proposed to unite by relation. It is, therefore, invariably held that a deed made in pursuance of a previous contract will, as between the parties, relate back to the date of the contract; but such relation will not be allowed to work injury to intermediate innocent purchasers or strangers who acquire an interest without notice. In other words, as between parties it is adopted for the advancement of justice, but is not permitted to work wrong to strangers.

Vancourt *v.* Moore, 26 Mo., 92.
Jackson *v.* Bard, 4 Johns., 230.
Fight *v.* Doe, 1 Blackf., 127.
Sampson *v.* Thornton, 3 Met., 275.
Wash. Real Prop., 3d vol., 308–'9.

In the case of Lessee of French and Wife *v.* Spencer (21 Howard, 228) Congress had passed an act, March 5, 1816, granting bounty lands to certain volunteers. Under this act a warrant was issued to one Silas Fosgit to locate 300 acres of land. This warrant was placed in the hands of an agent, who located it in Vigo county, Indiana, on June 3, 1816. No patent was issued for the land until the 26th of October, 1816. When issued the grant was made to said Silas Fosgit. On the 28th of June, 1816, after the location and before the issue of the patent, Fosgit conveyed the land to William H. Spencer, of New York.

The Supreme Court held that this land belonged to Spencer's heirs. The following language is found in the opinion of the court:

"Whether the patent related back in support of Spencer's deed is not a new question in this Court. It arose in the case of Landes *v.* Brant (10 How., 372), where it was held that a patent issued in 1845 to Clamorgan and his heirs, by which the heirs took the legal title, related back and enured to the protection of a title founded on a sheriff's sale of Clamorgan's equitable interest made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title, the Court holding when the patent issued it related to the inception of the title and must be taken, as between the parties to the suit, to bear date with the commencement of the title. It is also the settled doctrine of this Court that an entry in a United States land office on which a patent issues (no matter how long after the entry is made) shall relate back to the entry and date with it (Ross *v.* Barland, 1 Pet., 655). The fiction of relation is that an intermediate *bona fide* alienee of the incipient interest may claim that the patent enures to his benefit by an *ex post facto* operation and receives the same protection at law that a court of equity could afford him."

In this case the incipient interest alluded to was the location of the original warrant on the tract of land in dispute, and this location consisted only of a notice to the register of the local land office that the holder of the warrant desired

to locate it on certain lands. It is certainly clear that the Government at any moment thereafter and before the issue of the patent had a right to cancel this location, and the holder of the warrant would have had no remedy whatever against the Government. But inasmuch as the Government proceeded thereafter to issue the patent, the patent, when issued, related back so as to enure to the benefit of any one who held a deed from the original holder of the warrant.

A, holding a bounty land certificate, gave B a bond to convey to him land that might be entered thereby and a power of attorney to locate and obtain a patent. A having died, B located the land in A's name and the patent was issued to A. Under a special statute of Arkansas, in which State the lands lay, the administrator of A conveyed the land to B, in compliance with A's bond. The heirs of B sold and conveyed the lands, after patent, to third parties. In a controversy between B and the alienees of the heirs, this Court said "that the special act of assembly which authorized the administrator to make a valid deed and divest the title of the heirs was decided in this case by the supreme court of Arkansas, and which decision, on the effect of the State law, is conclusive on this Court."

Maxwell *v.* Moore, 22 How., 185.

In the case of Ross *v.* Barland, *supra* (1 Peters), the court says:

"In the action of ejectment they (the courts) look beyond the grant and examine the progressive stages of the title, *from its incipient state, whether by warrant, survey, entry, or certificate*, until its final consummation by grant, and if found regular and according to law in these progressive stages the grant is held to relate back to the inception of the right and to have dignity accordingly."

In Touchard *v.* Crow, 20 Cal., 150 (Field, chief justice), it is said:

"At the time the deed was executed the claim of Ayerman and others to the land embraced in the grant to Padilla was pending before the land commission for confirmation. The decree of confirmation affirmed the validity of that grant and of the claim of petitioners. The patent following the confirmation took effect by relation at the date of the presentation of the petition to the land commission, on February 24, 1852. As the deed of the United States, it is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time. (Citing 13 Cal., 478; 14 *id.*, 465; 15 *id.*, 361; 17 *id.*, 250; 18 *id.*, 570.) The deed to Stevens must therefore be held to have passed the interest acquired by the patent."

In State *v.* Barrett, 15 Cal., 361 (Field, chief justice), it is said:

"The patent is the last act of a series of proceedings taken for the recognition and confirmation of the patentee's right to the land it embraces, the first of which is the petition to the board of land commissioners. With reference to such proceedings, the patent takes effect by relation at the date of the first act; and so we have held in repeated instances. As the deed of the United States, it is to be regarded as if it had been executed at that time. * * * In the case at bar all the conveyances under which the plaintiff claims were executed previous to the issuance of the patent. They passed, therefore, only the right of the grantors under the grant. But the patent in recognizing the validity of the grant necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest."

The above doctrine has always been held by the supreme court of Missouri in similar cases.

Alexander *v.* Merry, 9 Mo., 510.
Page *v.* Hill, 11 Mo., 149.
Crowley *v.* Affalter, 49 Mo., 263.
Porter *v.* Mariner, 50 Mo., 364.
Papin *v.* Massey, 27 Mo., 445.
St. Louis *v.* Taney, 21 Mo., 243.
McCabe *v.* Worthington, 16 Mo., 514.

In Papin *v.* Massey, that court, speaking of the patent to Mackey or his legal representatives, says:

"It enured, then, to his legal representatives. These representatives may be his heirs or assigns. If he had conveyed the claim it would enure to his assignee. If there had been no conveyance the title would have passed to his heirs."

In Porter *v.* Mariner the Missouri court said:

"A sheriff's deed relates back to the sale as to the defendant in the execution and his privies and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time."

In Callahan *v.* Davis, 90 Mo., 78, it is said: "It will be seen that Thompson conveyed the land to Turpin by a quitclaim deed after he had entered it and before he received the patent; and the contention is that this deed did not convey the after-acquired title, so that Turpin only got an equity, and that the plaintiff cannot maintain this suit at law on that title. Thompson, by his certificate of entry, got an imperfect title, one upon which, by the laws of this State, he could have maintained an action of ejectment for the land against any person not having a better title (R. S., 1855, § 2, p. 690). The patent when issued made that imperfect title a perfect legal one. The entry and the patent were all several acts necessary to make a complete title, and are to have relation back to the act which created the equitable title;" citing—

Landes *v.* Brant, 10 How. (U. S.), 372.
Touchard *v.* Crow, 20 Cal., 150–'60.
Crowley *v.* Wallace, 12 Mo., 143.
Landes *v.* Perkins, 12 Mo., 239 (same title as in Landes *v.* Brant).
Stark *v.* Bassett, 15 Cal., 361.
Porter *v.* Mariner, 50 Mo., 364.
Gibson *v.* Chouteau, 39 Mo., 538.

Fenn *v.* Holme, 21 How. (U. S.), 481.
Leach *v.* Koenig, 55 Mo., 451.
3 Washburn R. E., 276.
Winn *v.* Cole, Walker's Miss., 119.
Gibson *v.* Chouteau, 13 Wall., 98.
Ford *v.* French, 72 Mo., 250.

The case of Massey *v.* Papin, 24 Howard, 362, is as follows:

In 1806 one James Mackey presented his Spanish claim before the board of commissioners, and in 1809 the board rejected the claim. In 1814 Mackey gave a bond in the nature of a mortgage to a part of the land to Delassus. Papin became the assignee of the mortgage and foreclosed and purchased, taking his title by sheriff's deed. The plaintiffs were Mackey's heirs. The defendant was Papin. Congress confirmed the claim, by the act of 1836, to James Mackey or his legal representatives, and on these facts this Court said:

"An imperfect Spanish title, claimed by virtue of a concession, was by the laws of Missouri subject to sale and assignment, and, of course, subject to be mortgaged for a debt. The heirs of Mackey took the lands by descent, with the incumbrance attached, and held them in like manner that their ancestor held. The grant of the lands to the heirs by the act of 1836 carried the equities of the mortgagee, with the legal title, of which he took the benefit—a consequence contemplated by the mortgage itself; and if the assignment had been in its form a legal conveyance of the lands, the grantee would have taken a legal title; and to this effect are the cases of Bissel *v.* Penrose, 8 How., 317, and Landes *v.* Brant, 10 How., 348.

"Intermediate conveyances made by one who has taken incipient steps to procure title will be covered by the legal title when obtained, and will pass such title to the alienees against the grantee and his heirs and against his assigns with notice; and this doctrine equally applies, whether such

intermediate conveyances are made by act of the grantee himself or by the sheriff under execution."

Stoddard *v.* Chambers, 3 How., 316.
Bissell *v.* Penrose, 8 How., 317.
Taylor *v.* Brown, 5 Cr., 553.
Stark *v.* Starrs, 6 Wall., 418.
Shepley *v.* Cowan, 91 U. S., 337.

To the same effect see this case (Hammond *v.* Johnston), 93 Mo., 198.

"Where there are divers acts concurrent to make a conveyance, estate, or other thing the original act shall be preferred, and to this the other acts shall have relation."

Citing—

Viner's Abridgment Title Relation, p. 290.
Jackson *v.* McMichael, 3 Cowan, 75.
Crowley *v.* Wallace, 12 Mo., 145.

In Chouteau *v.* U. S., 9 Peters, 147, it is held that—

"Orders of survey made by the lieutenant governor of Upper Louisiana are the foundation of title and are capable of being perfected into complete titles; *that they are property capable of being alienated, and as such to be held as sacred and inviolable as other property.*"

The location of a warrant or order of survey or an entry with the register and receiver is an *actual* location, an incipient and necessary step in the acquisition of title. It becomes a *perfected* location when returned to and approved by the Commissioner of the General Land Office. It becomes a completed title only on the issue of the patent. An alienee of the locator, at any moment after the first act, takes the title under the patent.

It is persistently urged by the counsel for plaintiffs that because a sheriff's deed is a quitclaim of an existing title the subsequent issue of a patent for the same land will

not enure to the purchaser at the sheriff's sale. On some principle not familiar to me, and unknown, I apprehend, to the law, he insists that the legal title is an after-acquired or different title from that involved in the equities previously existing in the same transaction and upon which the legal title emanated. This identical argument was pressed upon the Supreme Court of the United States in Landes *v.* Brant, 10 How., 374. In that case the alienee of the equitable title claimed under a sheriff's deed, precisely as we do in this case. Counsel for Landes in that case insisted that as the conveyances in the preceding case of Stoddard *v.* Chambers were voluntary deeds, *inter partes*, a distinction should be drawn between it and the case at bar. The point was thoroughly examined by that court and answered in the following language:

"There was no covenant for title in either the assignment from Bell to Mackey or in that from Mackey to Stoddard, each being quitclaim assignments."

The court thereupon applied the doctrine of relation under the sheriff's deed and held that the patent issued in 1845 related back to the time of filing the claim, in 1805, before the commissioners; and, said the court, "on this assumption intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title and passed that title to the alienee."

Where a grantor expressly limits his conveyance to an existing right or interest in land it is unjust that a different and subsequently acquired title should pass. But in this case the title conveyed by the patent is the same title and the same land sold by the sheriff. There is no new or different title acquired. As this Court held in Van Rensselaer *v.* Kearney, 11 How., 294:

"A deed of this character (the first named) purports to convey and is understood to convey nothing more than the

interest or estate of which the grantor is seized or possessed at the time and does not operate to bind an interest *not then in existence*. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it."

But the Court proceeds:

"If the deed bears on its face evidence that the grantors intended to convey and the grantee expected to become invested with an estate of a particular description or quality, or that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance."

Counsel totally failed to explain to the court how the legal title of survey No. 2500 ever became vested in Samuel Hammond without resort to the doctrine of relation. The confirmation of the land lying in New Madrid county was made by act of Congress April 29, 1816. That confirmation was not to Easton, but to Joseph Hunot. It was in lieu of a Spanish grant, given and confirmed to Hunot, that the Government consented to give and did give the land described in survey 2500, known as the New Madrid location. In order to support the proceeding leading up to the patent of 1859 it was necessary to show that those claiming under said patent owned certain lands which were injured by earthquakes in New Madrid county. It devolved upon the plaintiffs to show this fact. How do they show it? They first read a concession under the Spanish government to Joseph Hunot. They then read an application of Joseph Hunot, made January 31, 1811, to the board of commissioners to confirm this concession. They next read the report of Recorder Bates, dated November 1, 1815, recom-

mending this claim for confirmation to Joseph Hunot and not to Rufus Easton. They next read the act of confirmation, dated April 29, 1816, *made to Joseph Hunot and not to Rufus Easton.* They next read Recorder Bates' certificate, issued August 12, 1816, to Joseph Hunot or his legal representatives, reciting that the certificate was given in lieu of the lands injured by earthquakes in New Madrid county. They next presented the application made by Brown for Rufus Easton, June 16, 1818, to the surveyor general to locate the said certificate for the lands in dispute. They next present the survey returned by the deputy surveyor June 23, 1819, to the surveyor general's office, said survey being numbered 2500. They next show that this survey was returned to the recorder of land titles on January 8, 1833. It is then shown that on these proceedings a patent was issued by the Government on August 30, 1859, to Joseph Hunot or his legal representatives.

From this statement of the proceedings leading up to the patent it would appear that Joseph Hunot is the owner of the legal title of said survey. It is insisted, however, that the patent enures to the benefit of him who owned the injured land. But for the Spanish concession in New Madrid county there could have been no New Madrid location. Easton owned the New Madrid land when the exchange occurred, and is therefore owner of the located land. It will be observed that all these proceedings are dependent on each other, and they are all necessary to complete the title.

The court will observe that the two conveyances by the Government, the original concession and the New Madrid location, refer to Joseph Hunot as the original owner. If, therefore, the legal title, vested in Hunot by the patent of 1859, is made to enure to the benefit of Easton it must be effected by the doctrine of relation. In other words, the title conveyed by the patent to Hunot must relate back to 1810 in order to vest the legal title of the located land in Rufus Easton. Counsel has therefore adopted in this case a

species of relation that is accommodating. When the patent was issued, in 1859, he says in one breath the title related back only to 1833; in another he says it related back to 1810, so as to reach Hunot's deed to Vandenbenden. This is a species of relation which operates only for the benefit of the plaintiffs in error and always against the defendants.

For this extraordinary construction of the doctrine of relation counsel attempts to make the Supreme Court of the United States responsible. He refers to what is denominated as the "Hot Springs" cases (2 Otto, 698) and others of a similar character. And this brings me to the—

Law of New Madrid Locations.

In the Hot Springs cases nothing was decided nor intimated to sustain the position assumed by plaintiffs in the Missouri courts. Certain New Madrid certificates had been previously issued, and surveys thereof were made in 1820; but no returns of said surveys were made to the recorder's office. When these locations were made, in 1818, the Indian title to the land on which they were made had not been extinguished. The public surveys were not extended over the lands till 1838; nor was the sale of the lands at that time authorized by law. No New Madrid certificate could have been legally located on land the sale of which was not at the time authorized by law. Until surveyed, lands are never subject to sale or location. Before they ever came into market, to wit, April 20, 1832, Congress passed an act reserving from sale the Hot Springs and the surrounding lands to the United States. Under these circumstances the Supreme Court decided that the claimants were not entitled to the lands located under their New Madrid certificates. It is true that the court said in this case, as they have always said, that the land covered by the New Madrid locations was not segregated from the public domain and appropriated to the claimants as against the Government until the

return of the survey to the recorder of land titles, so as to prevent another appropriation of the same land by Congress. In that case there never had been a legal location of the certificates, and no appropriation could result. No title had vested in the claimants, because the claims were attempted to be located on land not surveyed nor subject to sale. The land was reserved for public uses before it ever became subject to sale; and in such cases the courts have invariably held that the location is void. But it is not said in this case, nor in *any* other case decided by this tribunal, that if patents in such cases had been issued the title would not have related back to the original issue of the New Madrid certificates as the incipient step necessary to procure the legal title. Indeed, in this identical case, the Supreme Court, in enumerating the steps necessary to obtain title under a New Madrid location, recites the following:

First. Application to the recorder asking a certificate of location.

Second. Issue of certificate by the recorder showing the amount of land to which the applicant is entitled.

Third. Application to the surveyor general presenting the certificate of location and describing the lands which the party desires to appropriate.

Fourth. Survey and plat by the deputy surveyor.

Fifth. Return of the survey and plat to the recorder of land titles to be filed and recorded, with a notice designating the tract located and the name of the claimant.

Sixth. Certificate of the recorder stating the facts and that the party is entiltedto a patent.

Seventh. Transmission of this certificate to the General Land Office.

Eighth. The patent.

Counsel refers also to the case of Lessieur *v.* Price (12 Howard, 59). In that case, as in the Hot Springs cases, each party claimed directly from the Government. It was a case where two titles had emanated from the Government, and the only controversy was which was the elder title. Lessieur claimed under a New Madrid location, the survey of which was returned to the recorder on February 11, 1822. The survey was not made by the deputy surveyor till August 5, 1821. Price claimed under the State of Missouri, it being a part of the land selected by the State under the act of March 6, 1820, granting four sections to that State for a capital.

On the 28th June, 1821, the State had fully completed the selection of four sections, and on that day required by law the governor to notify the surveyor general thereof, giving a full description of the lands selected, and on the 31st of December, 1821, the legislature completed the transaction by fixing the seat of government on the lands so selected and accepting them for that purpose.

Under these circumstances this Court said: "It follows that the legal title of the State of Missouri is older than the equitable title set up under Delisle's claim."

To the same effect is the case of Rector *v.* Ashley (6 Wall., 142). Rector claimed under a New Madrid location, of which no survey whatever had been returned to the surveyor general's office and the survey of which had not reached the recorder's office until June 16, 1838. Ashley claimed under the act of Congress approved June 23, 1836, granting to the State of Arkansas five sections of land to complete its public building at Little Rock. That State passed an act November 4, 1836, to sell the lands thus granted in June previous,

and on June 5, 1838, Ashley obtained the title sold by the State. The controversy, therefore, is between persons claiming separate and distinct titles, each claiming directly from the United States.

The learned judge who delivered the opinion in this case reviewed the case of Bagnell *v.* Broderick, 13 Pet., 436, in which it was said:

"The United States never deemed the land appropriated until the survey was returned to the recorder of land titles, for the reason that there were many titles and claims, perfect and incipient, emanating from the provisional governments of France and Spain and others from the United States in the land district where the New Madrid claims were subject to be located."

The court also quoted from the case of Barry *v.* Gamble, 3 How., 32, where it is said:

"Its (the survey's) return by the surveyor, with a notice of location, to the office of recorder was the first *appropriation* of the land."

The court then proceeds as follows:

"We are much pressed in the present case with the argument that the title here spoken of by the court is the *legal* and not the *equitable* title, and that, inasmuch as the applicant has done all that he can do to make good his claim to the land when he has deposited with the surveyor his certificate of loss, with a description of the land desired in exchange, he has thus acquired an equitable interest in the land so described *which the United States cannot divest by giving it to another.*

"But the rights of claimant are to be measured by the act of Congress and not exclusively by what he may or may not be able to do, and if a sound construction of that act shows that he acquires no *vested interest* in the land until the officers of the Government have surveyed the land and until that survey is filed in the office of the recorder and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they

be hard or lenient. It seems to us clear from the foregoing cases that the court intended to decide that until this was done the claimant acquired no *vested right* to the land; no title, legal or equitable.

"It is evident that in the case of Lessieur *v.* Price the court is not speaking of the legal title. The statute of 1815 required a patent to be issued on the return of the survey to the recorder's office. The *strict legal title* remained in the United States until the patent issued, and the court could not have referred to that. On the contrary, it is obvious that the court was endeavoring to fix the point in the proceedings when the right of the claimant became *vested, when his equity became a fixed fact*, when the land he sought was *appropriated* to him, and when his injured land became the property of the United States, and by each of the three decisions we have cited this is held to be when the survey is returned to the office of the recorder of land titles. The *legal* title conveyed by the patent may not issue for years afterwards, but by the act of the legislature of Missouri an action of ejectment could be maintained on the equitable title thus acquired. In the Federal court, however, according to repeated decisions, this could not be done for want of the legal title."

In such cases the courts must determine which is the elder title. It was not necessary to decide nor did the court decide what is the incipient step in the acquisition of a New Madrid title to which other and subsequent acts will relate as between the locator and those claiming under him. The only question was the one propounded by the court itself: "What acts were necessary on the part of the locator *to divest the United States of title?*" When the court in this case said that Rector "acquired no vested right to the land, no title, legal or equitable," until the return of the survey to the recorder, it used the words only as applicable to the case before it. The court meant to say, as it has always said in such cases, that until such return of the survey the claimant holds "no title, legal or equitable," *as against the United States*—no such title as in equity would compel the United States to convey him the land, and no such title as would

prevent the Government from conveying it to another. In fact, in the very next paragraph the court expressly says: "On the contrary, it is obvious that the court (lower) was endeavoring to fix the point in the proceedings when the right of the claimant became vested—when his *equity* became a *fixed* fact."

In Mackey *v.* Easton (19 Wall., 619) Justice Field, delivering the opinion, said:

"The actual location of the New Madrid certificate issued to Smith was made and approved in 1818. * * * This *actual* location became a *perfected* location so as to appropriate the land on the return of the survey to the recorder in 1823."

In the case of Gibson *v.* Chouteau, 13 Wall., 92, Chouteau undertook to connect himself by conveyances with the original locator of the New Madrid certificate, These deeds purported to convey only the equitable interest, because the land was not patented until 1862. The supreme court of Missouri excluded the deeds for reasons not connected with the fact that they conveyed only an equitable interest. When the case came into this Court it was held "the rulings of the State court upon these grounds are not open to review in this Court, as they involve no questions of Federal jurisdiction."

Chouteau, failing to establish conveyances of the equitable title, set up the statute of limitations, which he claimed barred the legal title because of ten years' adverse possession prior to the issue of the patent. The supreme court of Missouri so decided. In answer to this claim this Court, in its opinion delivered by Justice Field, used the following language:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the security and protection of persons

who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title.

"The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, *not connecting themselves with it by any valid transfer from the original or any subsequent holder.* The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

The learned judge, it is true, in discussing the doctrine of relation used the following language:

"Thus, in the present case the patent which was issued in 1862 is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to land desired by him had its inception, and, so far as it is necessary to protect his rights to the land and the rights of parties deriving their interest from him, the patent is held to take effect by relation as of that date."

It will be observed that it was wholly immaterial to the decision in this case at what period the equitable title may have begun. All that is said upon that subject is wholly unnecessary to the determination of the cause.

It is not intimated that an equitable title in the claimant did not exist prior to the return of the survey to the recorder of land titles. The title evidently alluded to by the court is what the same judge referred to in other cases as a "vested" or "complete" title.

In the case of Easton *v.* Salisbury, 21 How., 426, the controversy was between a Spanish concession to Mordecai Bell and the location of Easton under a New Madrid certificate

to one Smith. The Spanish grant prevailed *quoad* the land included therein.

The case of Mackey *v.* Easton, 19 Wall., 619, came to this Court by writ of error to the United States circuit court at St. Louis, and no question as to jurisdiction arose. The controversy was, which party held the deed of the James Smith to whom the certificate was issued. Counsel for Mackey insisted that Easton's title had been held bad in the former case, and that contention brought up for re-examination the Salisbury case, and what is said in respect of the return of the survey to the recorder is applicable alone to the Salisbury and not to the Mackey case. The language of the opinion is in strict accordance with all the opinions of this Court on that subject. It was delivered by Justice Field, whose numerous opinions in this Court and in the supreme court of California show a perfect knowledge of the whole subject.

It is said that there could be "no *effectual* appropriation of the land located under a New Madrid certificate until the survey was returned to the recorder of land titles;" that until that was done "there was no official recognition of the proceedings taken by the claimant *which bound the Government.*"

These opinions are in strict accordance with others in reference to pre-emptions. In Frisbie *v.* Whitney, 9 Wall., 187, it is said:

"A party by settlement upon lands of the United States with a declared intention to obtain a title to the same under the pre-emption laws does not thereby acquire such a *vested interest* in the premises as to deprive Congress of the power to make other disposition of them."

In the Yosemite cases, 15 Wall., 77, it is said that mere settlement on the public lands according to law creates no obligation on the Government to convey the land pre-empted; but "when the pre-emptor has complied with *all*

preliminary requirements and paid for the land he for the first time acquires a *vested* interest in the premises, of which he cannot be deprived."

Wirth *v.* Branson, 98 U. S., 118.

"He is then entitled to a certificate of entry from the local land officer and ultimately to a patent for the lands from the United States."

The Yosemite case, 15 Wall., 77.

Until such payment and entry the pre-emption laws give to the settler a privilege, only in case the lands are offered for sale, of purchasing them in preference to others. (*Idem.*)

And it is this privilege alone which in the case of Shepley *v.* Cowan, 91 U. S., 330, this Court said constituted the *incipient step* in the acquisition of title. The Court said:

"Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

In the opinion of Justice Field for the Court in this case (Shepley *v.* Cowan) is to be found tersely expressed the whole law of the case at bar:

"In these cases [alluding to Frisbie *v.* Whitney, 9 Wall., and the Yosemite case, 15 Wall.] the Court only decided that a party by mere settlement upon the public lands, with intention to obtain a patent under the pre-emption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands from sale whenever they might be needed for public purposes, as for arsenals, fortifications, light-houses, hospitals, &c.; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States or impair in any respect the power of Con-

gress to dispose of the land, &c.; but whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may as against each other acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property."

Plaintiffs insist that a New Madrid survey is to be exempted from the usual doctrine of relation. Why so? The inception of a New Madrid grant is a "certificate" by a Government officer. The second act is the "survey" of the location by the surveyor general. And this Court expressly held in the case of Ross *v.* Borland, above cited, that the doctrine applies to *all* cases of title, "whether by warrant, *survey*, entry, or *certificate*."

If an order of survey by the lieutenant governor of Upper Louisiana is "property capable of being alienated, and as such to be held as sacred and inviolable as other property," and if it was "capable of being perfected into a complete title," as announced by this Court, why shall an order of survey made and executed by a Government officer, by authority of a certificate made by another officer, and both under an act of Congress, be less sacred and inviolable as property or as a foundation of title?

J. B. HENDERSON,
For Defendant.

10 Orig. No 150,637

UNITED STATES OF AMERICA,

District of South Carolina.

FOURTH CIRCUIT—IN THE ~~SUPREME~~ CIRCUIT COURT. 1

EX PARTE C. B. SWAN.

PETITION FOR HABEAS CORPUS.

To the Supreme Court:

The petitioner, C. B. Swan, of the State of South Carolina, 2
complaining, shows that he is unjustly and unlawfully detained and imprisoned by G. I. Cunningham, United States Marshal for the District of South Carolina, in the jail at Charleston, in the State of South Carolina, by virtue of a warrant of commitment, issued under the following circumstances:

That on the 7th day of October, 1889, D. H. Chamberlain was appointed by the Circuit Court of the United States for the District of South Carolina receiver of the property of the South Carolina Railway Company, with the powers and author- 3
ity usual in such cases.

That on the 7th day of August, 1893, in the Circuit Court of the United States for said District, the said receiver filed his petition against your petitioner—a copy of which is hereto attached for the information of the Court—setting out said appointment, and that the duties which devolved upon said receiver in the operation of said railway was in part transporting and delivering goods belonging to citizens of other States, brought from other States by connecting railroads and other 4
common carriers, and by such carriers delivered to said receiver for transport and delivery in this State to the owners of such

goods, and alleging that in the performance of such duties the said receiver, on or about the 12th day of April, 1893, received from the Charlotte, Columbia and Augusta Railroad Company certain goods or merchandise, to wit, one barrel of liquor, marked "B," shipped at Statesville, in the State of North Carolina, by Lowenstein Brothers, citizens of that State, and consigned, as said receiver was informed, to Justin P. O'Neill, agent of said shippers in the city of Charleston, in the State of
5 South Carolina, but by mistake consigned to a different person; that said goods arrived in the said city of Charleston on the 13th day of April, 1893, and that while the same were lying undelivered in the warehouse of said receiver, in the city of Charleston, and before the freight thereon was paid, and while the question of the true ownership of said goods was in due course of adjustment and settlement, the said goods were, on the 1st day of August, in said year, forcibly, and against the protest of the agent of the said receiver, seized and taken pos-
6 session of by your petitioner, who refused to pay the freight thereon, and were by him transported beyond the control of the said receiver to some place to said receiver unknown.

The said petition further alleges, that in seizing the said goods, your petitioner produced no warrant or process of any court or judicial tribunal whatsoever, and exhibited as his only authority a commission purporting to show that he was a constable under the law of the State of South Carolina, commonly known as the Dispensary Act, and that said receiver was in-
7 formed and believed that the petitioner, at the time of said seizure, was aware of the facts and circumstances connected with the shipment of said goods, as set forth in said petition.

The petition of said receiver further alleged his responsibility to the owner of said goods for damages for wrongful delivery of the same, and to the said connecting line of railway for freight thereon, and asked that your petitioner be adjudged in contempt of Court, and that he be attached and punished therefor, and that he also be restrained from interfering with or disposing
8 of the said property, and that he be required to restore the same to said receiver, in order that the same might be dealt

with in accordance with the obligations incurred by said receiver in receiving and transporting the same.

Thereupon the Honorable Charles H. Simonton, United States Judge, on the said 7th day of August, 1893, issued an order, that a rule do forthwith issue against your petitioner, requiring him to show cause before said Circuit Court, on the 17th day of August, 1893, at the United States Court House at Greenville, South Carolina, why he should not be attached and punished as prayed for; also, that he do likewise show cause why 9
he should not be enjoined and restrained from interfering with any or all property of the South Carolina Company, or other property in the possession and control of the said D. H. Chamberlain, as receiver and officer of the said Court, or from interfering in any manner whatsoever with the officers and agents of the said receiver; and, also, in any manner whatsoever attempting to dispose of the said property, and why he should not be ordered to restore the same to said receiver; the said order providing that your petitioner in due course file an answer 10
to the said petition, showing cause why such further relief, as may be necessary, should not be granted, and in the meantime restraining and enjoining your petitioner from selling or in any manner whatsoever endeavoring to interfere with or dispose of the said property until the hearing of the said rule and the order of Court thereon.

That upon the service of said rule upon your petitioner, he filed in said Court a demurrer and a return, which were both heard together by his honor, Charles H. Simonton, presiding 11
in said Court, and which are hereto attached as exhibits "A" and "B" respectively, and are referred to as a part of this petition.

That the "Dispensary Act," referred to in said return, was passed by the Legislature of South Carolina and approved December 24th, 1892, and a copy thereof is hereto attached as exhibit "C," and made a part of this petition.

That after hearing the cause upon the said petition, demurrer, and answer, the Circuit Court ordered, adjudged, and 12
decreed, that the said rule be made absolute, and that the said C. B. Swan be adjudged guilty of a contempt of said Court, and

that the Marshal of said District take him in custody, and that he be imprisoned in the jail of Charleston County, until he returns to the custody of the receiver the barrel taken by him from the warehouse without warrant of law; and that when that has been surrendered, that he suffer a further imprisonment thereafter in said County jail for three months, and until he pay the costs of these proceedings.

The petitioner alleges and charges that such judgment was
13 erroneous and void, because the Judge had no jurisdiction or authority to render the same, and in so doing erred in both law and fact.

A copy of which decree is herewith attached for the information of the Court.

The facts, so far as stated in the decree, are true, but there are other facts which appear on the record of the case which are uncontradicted, to wit:

1. That while it is true, as stated in the decree, that your
14 petitioner acted upon his own motion and without instructions from any person, yet he did so act as such constable under the authority of his commission, and under the duty imposed upon him by the Dispensary Act itself to enforce it, and in the performance of such duty to seize the said liquor while in transit.

2. While the decree states the goods remained in the said place of deposit without any proceeding against it until the 8th day of August, yet, as appears by the return, your petitioner was unable to take any proceeding with propriety, as
15 he was not aware before that day who the owner was, and even if known, was beyond the jurisdiction of the State.

3. That while his Honor intimates in his decree that such interference with the said liquor in the hands of the receiver was not based upon a violation of the law by the receiver, yet by reference to the return it appears that it was based upon such charge, in that said receiver, as warehouseman, after the 1st day of July, was in process of violating the law by his readiness to deliver the liquor, and, as shown by the receiver's
16 return, and found by the decree of his Honor, that he only waited to deliver it because he did not know who the consignee was.

That by Act of Congress, approved March 3d, 1887, and amended by the Act approved August 1st, 1888, the receiver appointed for said railway company was required to manage and operate the property situated in South Carolina according to the requirement of the valid laws of South Carolina, in the same manner as if in the possession of the owner thereof; and said receiver was acting in violation of the laws of South Carolina in holding and keeping said barrel of liquor, after the 1st day of July, 1893, without a certificate, and endeavoring to deliver the same, knowing, or having sufficient reason to know, it was being kept by the owners and intended by them for unlawful sale, or to be unlawfully dispensed for some other purpose. Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of habeas corpus, to be directed to the said G. I. Cunningham, United States Marshal as aforesaid, may issue in this behalf, so that your petitioner may be forthwith brought before this Court, to do, submit to, and receive what the law may require.

C. B. SWAN.

D. A. TOWNSEND,
Attorney General of South Carolina, for Petitioner.

STATE OF SOUTH CAROLINA,
County of Charleston,

C. B. Swan, being duly sworn, deposes and says that he is the petitinner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the statements therein are true, as he verily believes.

Sworn to before me this the day of 1893.

C. B. Swan [SEAL]

Sworn to before me this the day of September 1893

H. H. Hendricks [Seal]
Notary Public

PETITION.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT.
} *Fourth Circuit. In Equity.*

In re F. W. Bound

vs.

The South Carolina Railway Company *et al.*

Ex parte D. H. Chamberlain, *Receiver of the South Carolina*
21 *Railway Company.*

To the Judges of the Circuit Court of the United States for the said District:

The petition of Daniel H. Chamberlain, Receiver of the South Carolina Railway Company, respectfully shows:

First. That the South Carolina Railway Company is a corporation duly incorporated under the laws of the State of South Carolina, and located and operated in the said State.

22 That under proceedings in equity in the above entitled cause, filed in the said Court on the 7th day of October, 1889, your petitioner was appointed by order of the Honorable Hugh L. Bond, Circuit Judge, dated on that day, temporary receiver of all the property and assets of said South Carolina Railway, with the usual powers of receivers in such cases, with direction to take possession of, hold, and manage the same, and conduct all the operations and business thereof, and with special authority to appear in, prosecute, or defend all suits or actions
23 then pending or thereafter to be brought by or against said corporation, which order was subsequently confirmed by said Court, at its sitting on the 5th day of December, 1889, and the appointment of your petitioner, with the powers, direction, and authority aforesaid, made permanent; and your petitioner has duly qualified under said appointment, and has ever since been in possession of and has conducted the operations of said South Carolina Railway Company, under the orders, control, and direction of said Court, all of its property and assets being
24 in his charge and possession as an officer of said Court.

Second. That among the duties devolved upon your petitioner in the operation of the said railway as a common carrier under

the laws and Constitution of said State and of the United States, is that of transporting and delivering goods belonging to citizens of other States, brought from other States by connecting railroads and other common carriers, and by such carriers delivered to your petitioner for transport and delivery in this State to the owners of such goods.

Third. That in the performance of such duties your petitioner, on or about the twelfth day of April, 1893, received from the Charlotte, Columbia and Augusta Railroad Company, a railroad 25
company and common carrier, then in charge of F. W. Huidekoper and Reuben Foster, receivers, under order of this honorable Court, in the case of W. P. Clyde and others *vs.* the Richmond and Danville Railroad Company and others, which railroad company connects with the railway under your petitioner's charge, certain goods or merchandise, to wit, one barrel of liquor, marked "B," shipped at Statesville, in the State of North Carolina, by Lowenstein Brothers, citizens of that State, and really consigned, as your petitioner is informed, to Justin 26
P. O'Neill, agent of said shippers in the city of Charleston, in the State of South Carolina, but by mistake consigned to a different person.

Fourth. That said goods arrived in the said city of Charleston on the 13th day of April, 1893, and while the same were lying undelivered in the warehouse of your petitioner in the city of Charleston, and before the freight thereon was paid, and while the question of the true ownership of said goods was in due course of adjustment and settlement in good faith, the 27
said goods were, on the 1st day of August, in said year, forcibly, and against the protest of the agent of your petitioner, seized and taken possession of by one C. B. Swan, who refused to pay the freight thereon, and by him were transported beyond the control of your petitioner to some place to your petitioner unknown.

Fifth. That in seizing the said goods and forcibly dispossessing your petitioner of the same, the said C. B. Swan, as your petitioner is informed and believes, produced no warrant or 28
process of any court or judicial tribunal whatsoever, but exhibited as his only authority a commission purporting to

show that he was a constable under the law of the State of South Carolina, commonly known as the "Dispensary Act."

Sixth. That your petitioner is informed and believes that the said Swan was duly informed by the agent of your petitioner, at the time of such unlawful seizure of said goods, of the facts and circumstances set forth in the third and fourth paragraphs of this petition.

Seventh. And your petitioner further shows that by law he
29 is responsible to the owner of said goods for damages for the wrongful delivery of the same, and to the said receivers of said Charlotte, Columbia and Augusta Railroad for the collection of the freight due to said railroad for the transportation of said goods over said road; and your petitioner submits that it his duty as the officer of this Court to protect the said property in his possession and in the custody of the Court from unlawful seizure and detention.

Wherefore, your petitioner, having shown that the conduct
30 of said C. B. Swan is in contempt of this honorable Court, prays that said C. B. Swan be attached and punished therefor, and that said C. B. Swan be likewise restrained by an order of this Court from interfering with or disposing of the said property, except under the order of this Court, and that he be required to restore the same to your petitioner's possession, in order that the same may be dealt with in accordance with the obligations incurred by your petitioner in receiving and transporting the said goods, and for such other relief as to the Court
31 may seem meet. JOS. W. BARNWELL, *Pro Pet.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

Personally appeared before me C. M. Ward, who, being duly sworn, says that he is General Manager for the petitioner above named, and that the matters and things stated in the foregoing petition, so far as they depend upon his own knowledge, are true; and so far as they depend upon the information of others, he believes them to be true. C. M. WARD.

32 Sworn to before me this 5th day of August, A. D. 1893.

ROBT. J. KIRK, *Not. Pub.*

EXHIBIT "A."

UNITED STATES OF AMERICA, District of South Carolina. } *Fourth District. In Equity.*

In re Bound

vs.

The South Carolina Railway Company.

Ex parte Daniel H. Chamberlain, as Receiver.

In obedience to the order of the Court herein, passed on the 7th day of August, 1893, requiring the respondent to show cause, if 33
any he can, why the relief asked in the petition should not be granted, now comes your respondent, and, waiving no right, demurs to the petition herein, for that it does not state facts sufficient to constitute any ground for the relief therein demanded,

In that it appears on its face:

1. That the liquor in question, at the time of its seizure, had been shipped by Lowenstein Brothers, of Statesville, North Carolina, to their agent at Charleston, South Carolina, to be sold, and that it was awaiting to be delivered to said agent, to 34
be sold or disposed of for some other purpose, contrary to law of the State known as the Dispensary Act, under which it was alleged in the petition to have been seized.

2. That the same being in transit when the respondent, as a commissioned constable under said Act, seized it without a warrant, as alleged in the petition, he was authorized by said Act so to do, and to take the same into the custody of the law.

D. A. TOWNSEND,
Attorney General, for Respondent. 35

I certify that the foregoing demurrer is interposed in good faith, and is not intended merely for delay.

D. A. TOWNSEND.

I, J. E. Hagood, Clerk of the said Court, do hereby certify, that the foregoing demurrer is a true copy of the original, now on file in this office.

Given under my hand and seal of said Court, at Charleston, S. C., this 7th day of September, 1893. 36

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

EXHIBIT "B."

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT. } *Fourth Circuit. In Equity.*

In re F. W. Bound

versus

The South Carolina Railway Company *et al.*

Ex parte D. H. Chamberlain, *Receiver of the South Carolina Railway Company.*

37

The respondent, C. B. Swan, upon whom has been served an order in the above stated cause, to show cause before his honor, Judge Simonton, on the 17th day of August, 1893, why he should not be attached and punished, as prayed for in the petition of Daniel H. Chamberlain, as receiver of the South Carolina Railway Company, would respectfully state, and for cause shows as follows:

38 Your respondent first shows that such attachment and rule should not issue against him, for the following legal reasons, arising from the facts which appear upon the face of the petition:

1. That said seizure of the barrel of whiskey was made under the provisions of the said law, known as the Dispensary Law.

2. That said goods had been unlawfully sold in the city of Charleston, in the State of South Carolina, after the first day of July, 1893, and after said Act had gone into effect, and was the law of the land.

39 3. That it further appears, and your respondent joins in emphasizing the fact, that he was a constable, duly and regularly appointed and commissioned under the laws of the State of South Carolina.

4. That said seizure of said barrel of whiskey, so made by deponent, was made under lawful authority, being authorized by a valid law of the State.

5. That it does not show that respondent has interfered with the duties of the receiver as a common carrier, as charged.

40 6. That it does not show that respondent has interfered with the carrying on of interstate commerce.

7. That it does not appear that any freight was due upon

said barrel of whiskey so seized by your respondent, inasmuch as said article was contraband, common nuisance, and forbidden by the laws of the State.

And for a further cause, he shows: That he is a regularly and duly appointed and commissioned constable, appointed and commissioned under the laws of South Carolina.

That under the laws of the State of South Carolina, and by authority of the same, he made the seizure of said barrel of whiskey. He denies that he has interfered with the duties of 41
said receiver as common carrier, as alleged. He denies that he has interfered with the duties of said receiver in the carrying on of interstate commerce.

That he denies that any freight was due or collectable upon said barrel of whiskey, inasmuch as such article was contraband, and being kept and transported contrary to the Dispensary Act.

That said barrel of whiskey had been unlawfully brought into the State, unlawfully kept for sale, and was actually being 42
delivered in the city of Charleston after the first day of July, 1893, and when there was no dispensary in the city of Charleston, and on the first day of August, 1893, was sold, and was actually being delivered.

The respondent denies that said goods were in the possession of the petitioner or his agent, but alleges that they were in the possession and under the control of the said consignors, Lowenstein Brothers, and had been in such possession and under such control for unlawful sale since the 1st day of July, 1893, 43
up to said sale, immediately preceding said seizure.

That he admits the truth of the allegations contained in paragraphs first and second of the petition of Daniel H. Chamberlain, as receiver.

That as to the allegations contained in paragraph third of the complaint, he has no knowledge or information sufficient to form a belief, except as hereinafter stated; that at sometime after the 1st of July, 1893, and before the 1st day of August, 1893, the respondent was informed by employees of the receiver 44
herein, that the said barrel of whiskey was consigned and to be delivered, upon the payment of the price of the same and

freight, to a certain committee in the city of Charleston. At another time your deponent was informed it was consigned and to be delivered to a party who passed under the name of Bullwinkle, color to which was lent by the fact that there was marked upon said barrel the letter [B], enclosed in a diamond shaped, marked with Charleston, S. C., also upon the same; that as a further corroboration of the said information, the agent of said petitioner showed him a written insertion made
45 by pencil in a book, from which said agent purported and pretended to read the name of Bullwinkle, as the name of the consignee; and now for the first time your respondent is informed by the petitioner that this liquor, in quantity sufficient to warrant the belief that it was intended for unlawful sale, was to be consigned and delivered to Justin P. O'Neill, who is acting as agent of Lowinstein Brothers, whiskey merchants, residing out of the State of South Carolina, the said Justin P. O'Neill being of the city of Charleston, in the State of South
46 Carolina, as deponent is informed.

That your deponent has not been able to find out when said barrel of whiskey was received in Charleston; but respondent alleges that for several days immediately preceding the 1st day of August last, said barrel of whiskey was not visible to the deponent when he visited the place used by said railway company for the storage of freight; and that upon the said 1st day of August, 1893, and after the going into effect of the Evans Act, the said barrel was prominently brought into view, for
47 the further purpose, as the respondent hereby believes, and had good cause to believe, of the unlawful delivery and sale of said liquor to some parties to deponent unknown. That being without help or assistance to watch the said barrel of whiskey, which was the guilty evidence of said violation and sale, consummated after the 1st day of July, 1893, the respondent believing a case properly made out under the provisions of said Evans bill, did seize the said barrel of liquor, as required by law, and turned the same over to the Sheriff of Charleston
48 County, who now holds said whiskey subject to the provisions of the law as contraband whiskey, the purpose being to secure the arrest of the violators of the law; but upon inquiry the

respondent could not find out who was the *bona fide* consignee of said whiskey until after the service of said rule upon the respondent, and for that reason the said consignee was not arrested.

That he admits the seizure of said goods, which he then believed was being kept and sold contrary to law, aided and assisted by the employees of petitioner.

That he denies that he was duly informed by the freight agent, or other employee, at or before the seizure of said barrel 49
of whiskey, on the 1st day of August, of the facts and circumstances set forth in the third and fourth paragraphs of the petition, as herein before or after stated.

That your respondent, answering the allegation contained in the seventh paragraph, respectfully says, that if any injury or damage has accrued to said receiver, it is in consequence of his aforesaid own violation of the laws of the State, having in his possession after the 1st day of July, 1893, and after his said duty of common carrier had ceased, whiskey in quantity sufficient 50
cient to justify the belief that it was for unlawful purposes, and through its employees making divers and different representations of the consignee, the putting away out of sight the said barrel, the bringing it out again, the mysterious and suspicious actions of petitioner's employees in connection therewith, which cannot be described, but was observed; and that said petitioner ought not now to be allowed to take advantage of said acts, representations and conduct and wrong herein.

That he verily believes, and so charges, that the change to 51
the said Justin O'Neill has been made since the 1st day of July, 1893, if, indeed, the said O'Neill is interested at all in the said transaction.

That said seizure was made in the *bona fide* belief that the law was being violated, upon the appearances upon his mind, made as aforesaid, in the city of Charleston, at a time when there was no dispensary in said city, and when respondent felt it his duty as a constable of said State to make the seizure; more especially did it seem reasonable and probable cause, when 52
the newspapers of the day charged openly in the public prints that the law was being violated in the said city by the bring-

ing in of the said liquors; and taken in connection with the (to the respondent) irrefragible proofs, in the varying changes in the consignees, the moving backward and forward of the barrel, in sight one day and out of sight another day, the showing of an entry made by lead pencil of consignee's name as Bullwinkle, the letter B upon the barrel corroborating the same instead of the bill of lading, and the further knowledge that liquors were being sold in Charleston contrary to law,
53 were matters that carried conviction to his mind.

That he emphatically denies that he intended any disrespect or contempt to this Court, but, on the contrary, he was doing what he considered his duty, and that he has the highest regard and respect for your Honor, personally and officially.

Now, therefore, since these matters have been brought to the attention of your Honor, and the delivery of said barrel being sought to be made after the 1st day of July, 1893, and the respondent being required by his duty as such constable to
54 watch for violations of and compel compliance to the Dispensary Act; the said railway company being in the exclusive direction of the said receiver, your respondent would respectfully ask that an order may be passed by your Honor enjoining the receiver and his employees, agents, and servants, from carrying, keeping, depositing, and transferring intoxicating liquors, contrary to the Dispensary law of the State of South Carolina.

Wherefore, your respondent prays that he may be dis-
55 charged.

D. A. TOWNSEND,
Attorney General, for Respondent.

UNITED STATES,
District of South Carolina,
County of

Personally appeared C. B. Swan, who, being duly sworn, deposes and says that the matters stated in the foregoing answer to show cause are true of his own knowledge, except the matters therein stated on information and belief, and as to
56 those matters he believes them to be true.

C. B. SWAN.

Sworn to and subscribed before me, this day of August, 1893.

DECREE.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT.

In re F. W. Bound

vs.

The South Carolina Railway Company *et al.*

Ex parte D. H. Chamberlain, *Receiver of the South Carolina Railway Company,*

vs.

C. B. Swan.

This case comes up on a petition and the rule thereon, to show cause why the respondent be not attached for contempt of this Court, and upon demurrer to the petition, supported by an answer.

The facts of the case, as shown by the papers, are these: On the 12th April, 1893, the South Carolina Railway Company, a corporation in the charge of a receiver appointed by this Court, and a common carrier, received from a connecting road a barrel of liquor, marked "B," shipped by Lowenstein Brothers, citizens of North Carolina, from Statesville, in that State, and consigned to Charleston, South Carolina. The barrel, after its arrival, was stored in the warehouse of the railway company, awaiting the ascertainment of the person to whom it was consigned. Owing to some confusion arising from the obscurity of the bill of lading, or from the marks of the barrel, there was much difficulty in discovering this fact, and the matter was thoroughly investigated. It now appears that the real consignee was Justin P. O'Neill, of Charleston, agent for the shippers. Pending this investigation, and whilst the goods were thus in the warehouse of the receiver, freight thereon being unpaid, and before any conclusion had been reached as to the disposition to be made of the goods, C. B. Swan, the respondent, entered the warehouse, seized the goods, took them out of the

custody of the receiver, and deposited them in the jail of Charleston County, in the care of the sheriff. This seizure was on 1st August, 1893. The respondent showed no authority from either the consignee or consignor of the goods. Nor did he produce any warrant, by virtue of which the search and seizure were made. When questioned as to his authority, he produced his commission as a constable of the State. His suspicions had been excited respecting this barrel, it having been,
61 presumably from necessity, removed from one part of the floor of the warehouse to another, and he acted on his suspicions. At the hearing, it was admitted that his course was of his own motion, without instructions certainly from any one in the legal department of the State, and in all probability he was without instructions from any other person. After seizure, the goods remained in the place of deposit selected by Swan, without any proceeding or application whatever, until the issuance and service of this rule, that is to say, from August 1st to August 8th.

62 Were this simply a case of interference with property in the hands and custody of this Court, without notice to it, and without action on its part, its settlement would be easy. Were it even based upon a charge of violation of the law on the part of the receiver, and sustained by a mandate issuing from any proper authority, the Court would not be slow to believe that the manner of the execution of the mandate arose from inadvertence, and would lend its aid to an investigation of the charge, and a due execution of the law. As a common carrier,
63 the receiver is bound to respect and obey the laws of the State. He and the Court from whom he holds his appointment are servants of the law, exceptionably bound to pay it the utmost deference and respect.

But the real issue in this case is vastly more important than an interference with property in the hands of the Court. It is far reaching in its consequences, and concerns not only the receiver, but every other citizen.

Has any constable the right without warrant to search prem-
64 ises and to seize property, when he suspects that a violation of the law is intended? The learned Attorney General, in an argument characterized by ability and great fairness, admitted

that unless express authority was given him in the Statute, he could not have acted legally without a warrant. He relies upon cases in Massachusetts and Vermont, in which this point is clearly stated. Upon examining these cases, and no other reference to them is necessary, it was found that the Statute in so many words gave express authority to act without a warrant in certain exceptional cases. When he sought this authority in the Statute of South Carolina, he relies on the words of the 25th section: "All such liquors intended for unlawful sale in 65
this State may be seized in transit and proceeded against as if it were unlawfully kept and deposited in any place." This language certainly does not expressly authorize seizure without warrant. And before they can be seized even under this section, it must appear that the goods were in transit, and that they were intended for unlawful sale in this State, two facts essential to the seizure, surely not determinable by a constable in his own mind upon his own suspicion. The Dispensary Act itself creates the presumption against a package of intoxicating 66
liquor that it is intended for unlawful sale in but one place only. The 2d section says: "Any package containing intoxicating liquors without such certificate (the certificate of a County Dispenser), which shall be brought into this State, or shipped out of the State, or shipped from place to place within the State, by any railroad, express company, or other common carrier, shall be regarded as intended for unlawful sale." This is a rule of evidence prescribed only in civil or criminal proceedings against the common carrier transporting liquors 67
without such certificate, and the language can be extended to no other case. It must be remembered that this section applies only to intoxicating liquors which shall be brought into the State, &c., after the Act went into operation, 1st July, 1893, and has no application to this package, which was brought into the State 12th April, 1893, and thereafter was neither being shipped out of the State nor from place to place within the State, but was kept in the warehouse and held there.

The 22d section of this Act is the key of it. It says: "All 68
places where intoxicating liquors are sold, bartered, or given away, in violation of this Act, or where persons are permitted

to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery, in violation of this Act, are hereby declared common nuisances."

The draughtsman of this section with great care adds: "And *if* the existence of such nuisance be established either in a civil or a criminal action, upon the judgment of a Court or Judge having jurisdiction, finding such place to be a nuisance, the
69 Sheriff, his deputy, or any constable of the proper county or city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so under the provisions of this Act, and by taking possession of the intoxicating liquors found therein." If this Act dealt with intoxicating liquors as if they were a deadly poison, whose presence is noxious; if the danger from them was treated as of the immediate character attending a ferocious animal at large, or the seeds of a pestilence, then the
70 language of the Statute might receive the most enlarged construction, in seeking to abate such a fearful nuisance. But it must be borne in mind that from the whole tenor of this Act the use of intoxicating liquors as a beverage by the mass of the community is recognized, and its use for this purpose is not discouraged. The sale of it is to be conducted openly and in public places. The whole purport, meaning, intent of the Act is to place such sale in the hands of certain persons recognized and appointed by the highest functionaries in this State, and
71 to bring it within reach of the people. Even upon general principles, it would be impossible to enlarge the tenor of the act, and to give enormous power to the most subordinate class of officials known to the law, and to authorize such search and seizure by them without warrant. Deep down in the heart of the Anglo-Saxon race is the abhorrence of every such exercise of power almost absolute, and such exercise is never tolerated except in the most extreme and urgent cases, when the safety of the people becomes the supreme law. But if the
72 Statute did in so many words expressly authorize the search and seizure without warrant, will this justify the respondent in this case?

The Constitution of South Carolina in its Bill of Rights, Article 1, Section 22, declares: "All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers or possessions. All warrants shall be supported by oath or affirmation, and the order of the warrant to a civil officer to make search or seizure in suspected places, or to arrest one or more suspected persons, or to seize their property, shall be accompanied with a special designation of the persons, and the objects of search, arrest, or seizure. And 73
no warrant shall be issued but in the cases and with the formalities prescribed by the laws." This is the limit of the power of the Legislature in searches and seizures.

In the case now before us, there is not even the excuse for haste. The goods were stored and kept in a warehouse, not at a place for sale. No concealment whatever was practiced. In his answer, the respondent says that for several days he saw the package and watched it. Any notification to this Court would have absolutely secured him from any removal of it. 74
Within his reach, at any hour of the day, he could have gone before any justice or judge, and could have obtained, or at least could have sought, a warrant. The process of law was within his reach. Even when he searched and seized the package, he openly disregarded the law. For eight days he remained inactive, taking no steps whatever to justify, support, or legalize his action. It does not appear that he even reported it to any one. His contempt of private rights went far beyond his disregard of the existence and authority of this 75
Court.

It is ordered, that the rule be made absolute, and that the respondent, C. B. Swan, be adjudged guilty of a contempt of this Court.

It is further ordered, that the Marshal of this district take him in custody, and that he be imprisoned in the jail of Charleston County, until he returns to the custody of the receiver the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered, that he 76
suffer a further imprisonment thereafter in said county jail

for three months, and until he pay the costs of these proceedings. CHARLES H. SIMONTON,
U. S. Judge.

31st August, 1893.

I, J. E. Hagood, Clerk of the said Court, do hereby certify that the foregoing opinion and order is a true copy of the original, now on file in this office.

Given under my hand and seal of said Court, at Charleston,
77 S. C., this 4th day of September, 1893.

[L. S.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

SUPREME COURT OF THE UNITED STATES.

Before Mr. Justice Field. In vacation.

Ex parte: In the matter of C. B. Swan.

On consideration of the petition of C. B. Swan, it is now here ordered, that cause be shown by G. I. Cunningham, United States Marshal for the District of South Carolina, before the Supreme Court of the United States, at Washington, on Monday, the 23d day of October, 1893, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of *habeas corpus* should not be granted, as prayed in said petition. STEPHEN FIELD,
Associate Justice of the Supreme Court of the United States.

September 21, 1893.

THE DISPENSARY LAW.

TO REGULATE THE

MANUFACTURE

AND SALE OF

LIQUORS

IN THE

State of South Carolina.

SUMTER, S. C.:
HERALD JOB PRESSES.
1893.

THE DISPENSARY LAW.

TO REGULATE THE

MANUFACTURE

AND SALE OF

LIQUORS

IN THE

State of South Carolina.

AN ACT.

TO PROHIBIT THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS AS A BEVERAGE WITHIN THE STATE, EXCEPT AS HEREIN PERMITTED.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly and by the authority of the same, That on and after the first day of July, A. D. 1893, the manufacture, sale, barter or exchange, or the keeping or offering for sale, barter, trade or exchange, within this State of any spirituous, malt, vinous, fermented or other intoxicating liquors, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation or association, shall be regulated and conducted as provided in this Act.

SEC. 2. The Governor shall within thirty days from the approval of this Act, appoint a Commissioner, and all subsequent appointments, which appointments shall be submitted to the Senate at its next session for its approval, believed by him to be an abstainer from intoxicants, who shall, under such rules and regulations as may be made by the State board of control, purchase all intoxicating liquors for lawful sale in this State, giving preference to manufacturers and brewers doing business in this State, and furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in this Act. Said commissioner shall reside and have his place of business in the city of Columbia in this State, and hold his office two years from appointment, and until another is appointed in his stead, subject to removal for cause by the State board of control. He shall qualify and be commissioned the same as other officers, and receive an annual salary of $1,800, payable at the same time and in the same manner as is provided for the payment of salaries of State officers. He shall be allowed a book-keeper, who shall be paid in the same manner a salary of $1,200, and such other assist-

ants as in the opinion of the board of control may be deemed necessary. He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina College and declared to be pure and unadulterated: Provided, That said State board of control shall have authority to appoint such assistants as they may find necessary to assist the chemist of the South Carolina College in making the analysis required by this Act, and the said State board of control may fix such reasonable compensation, if any, as they may deem proper for the services rendered by such chemists, or such assistants. The State commissioner shall receive from said county dispensers for such liquors sold to them more than 50 per cent. above the net cost thereof, and the amounts so received by him from said sales shall be by him paid over to the Treasurer of the State monthly, under such rules as may be made by the State board of control to insure the faithful return of the same; and the State Treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amounts necessary to pay the expenses incurred in conducting the business of said agency. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors, or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by a State board of control, composed of the Governor, the Comptroller General and the Attorney General. He shall, before entering upon the duties of his office, execute a bond to the State Treasurer, with sufficient sureties, to be approved by the Attorney General, in the penal sum of $10,000 for the faithful performance of the duties of his office. In all purchases or sales of intoxicating liquors made by said commissioner, as contemplated in this act, the commissioner shall cause a certificate to be attached to each and every package containing said liquors, when the same is shipped to him from the place of purchase, or by him to the county dispensers, certified by his official signature and seal, which certificate shall state that the liquors contained in said package have been purchased by him for sale within the State of South Carolina, or to be shipped out of the State, under the laws of said State, and without such certificate any package containing liquors which shall be brought into the State, or shipped out of the State, or shipped from place to place within the State by any railroad, express company or other common carrier shall be regarded as intended for unlawful sale, and upon conviction thereof such common carrier shall be liable in a penalty of $500 for each offense, to be recovered against said common

carrier in any court of competent jurisdiction by complaint proceedings to be instituted by the solicitor for any circuit, with whom evidence of the violation may be lodged by any citizen having knowledge or information of the violation: and any person knowingly attaching or using such certificate without the authority of the commissioner, or any counterfeit certificate for the purpose of securing the transportation of any intoxicating liquors into, out of or within this State, in violation of law, shall upon conviction thereof be punished by a fine of not less than $100 and imprisonment in the penitentiary for not less than one year for each offense. Said commissioner shall make a printed quarterly statement under oath, commencing August 1, 1893, of all liquors sold by him, enumerating the different kinds and quantity of each kind, the price paid and the terms of payment, and to whom sold. Also, the names of the parties from whom the liquor was purchased, and their place of business and date of purchase, which statement shall be filed with the State board of control: Provided, This section shall not apply to malt liquors shipped in cases or bottles thereof shipped in barrels.

SEC. 3. The State commissioners shall before shipping any liquor to county dispensers cause the same to be put into packages of not less than one-half pint nor more than five gallons, and securely seal the same, and it shall be unlawful for the county dispenser to break any such packages or open the same for any reason whatever. He shall sell by the package only, and the purchaser shall not open the same on the premises.

SEC. 4. It shall be the duty of the State board of control to appoint a county board of control composed of three persons, believed by said board not to be addicted to the use of intoxicating liquors, who shall hold their office for a term of two years, and until their successors are appointed. Said county board of control shall be subject to removal for cause by the State board of control. Said county board shall make such rules as will be conducive to the best management of the sale of intoxicating liquors in their respective counties: Provided, all such rules shall be submitted to the State board and approved by them before adoption. Said county board of control shall qualify and be commissioned the same as other officers without fees therefor.

SEC. 5. If any county dispenser, or his clerk, shall purchase any intoxicating liquors from any other person or persons except the State commissioner, or if he or they, or any person or persons in his or their employ, or by his or their direction, shall sell or offer for sale any liquors other than such as have been purchased from the State commissioner, or shall adulterate or cause to be adulterated any intoxicating, spirituous or malt liquors which

he or they may keep for sale under this act, by mixing with the same any coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kind or quality, or with water, or shall sell or expose for sale such liquors so adulterated, knowing it to be such, he or they shall be guilty of a misdemeanor and be fined in a sum of not less than two hundred dollars or imprisoned in the county jail for not less than six months.

SEC. 6. That on and after the first day of July, 1893, no person, firm, association or corporation shall manufacture for sale, sell or keep for sale, exchange, barter or dispense any intoxicating liquors for any purpose whatever, otherwise than as provided in this act. County dispensers as herein provided, shall alone be authorized to sell and dispense intoxicating liquors, and all permits must be procured, as hereinafter provided, from the county board of control: Provided, that no license for the sale of spirituous liquors now authorized to be granted by municipal authorities shall be of any force or effect after the 30th day of June, 1893, but licenses may be issued or extended to said 30th day of June, 1893, upon payment of one-half of the annual license required by the municipal and county authorities in cities or towns, where such licenses are or may be authorized to be issued: Provided, further, that manufacturers of distilled malt or vinous liquors who are doing business in the State shall be allowed to sell to no person in this State except the State commissioner and to parties outside of the State. Every package, barrel or bottle of such liquors shipped beyond the limits of this State shall have thereon the certificate of the State commissioner allowing same, and otherwise it shall be liable to confiscation, and the railroad carrying it shall be punished as in section 2. And provided, that any person shall have the right to make wine for his or her own use from grapes or other fruit.

SEC. 7. Applications for position of county dispensers shall be by petition signed and sworn to by the applicant and filed with the county board of control at least ten days before the meeting at which the application is to be considered, which petition shall state the applicant's name, place of residence, in what business engaged, and in what business he has been engaged two years previous to filing petition; that he is a citizen of the United States and of South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a licensed druggist, a keeper of a hotel, eating house, saloon, restaurant or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage. This permit or renewal thereof shall issue only on condition that the ap-

plicant shall execute to the county treasurer a bond in the penal sum of three thousand dollars, with good and sufficient sureties, conditioned that he will well and truly obey the laws of the State of South Carolina now or hereafter in force in relation to the sale of intoxicating liquors; that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for violation of such laws during the term for which permit or renewal is granted, and will not sell intoxicating liquors under permit at a charge exceeding fifty per cent. above the cost thereof. Said bond shall be for the use of the county or any person or persons who may be damaged or injured by reason of any violation on the part of the obligor of the law relating to intoxicating liquors purchased or sold during the term for which said permit or the renewal thereof is granted. The said bond shall be deposited with the county treasurer, and suit thereon shall be brought at any time by the solicitor or any person for whose benefit the same is given; and in case the conditions thereof, or any of them, shall be violated, the principal and sureties thereon shall also be jointly and severally liable for all civil damages, costs, and judgments that may be obtained against the principal in any civil action brought by wife, child, parent, guardian, employer or other person, under the provision of the law. All other moneys collected for breaches of such bond shall go into the county treasury. Said bond shall be approved by the county board of control under the rules and laws applicable to the approval of official bonds.

SEC. 8. There may be one county dispenser appointed for each county, whose place of business shall be at the county seat of said county, except the city of Charleston, for the county of Charleston, where there may be ten dispensers, and except for the city of Columbia, for the county of Richland, where there may be three dispensers appointed, whose place of business shall be located in such sections of said cities as will be most convenient for the accommodation of residents thereof. At least ten days before the first day of the meeting at which the applications for the position of county dispenser are considered, the applicant shall file with the county board of control, and a copy thereof with the clerk of court, in support of the application, such a petition, as is provided for in section 7, signed by a majority of the freehold voters of the incorporated town or city in which the permit is to be used, and each person aforesaid shall sign said petition by his own true name and signature, and state that each before signing has read said petition and understands the contents and meaning thereof and is well and personally acquainted with the applicant: Provided, that in the judgment of the county board of control

other dispensaries may be established in other towns in any county.

SEC. 9. If the application for the position of county dispenser be granted, it shall not issue until the applicant shall make and subscribe on oath before the clerk of the county board of control, which shall be endorsed upon the bond, to the affect and tenor following: "I ————————, do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep and sell intoxicating liquors; I will not sell, give or furnish to any person any intoxicating liquors otherwise than is provided by law, and especially, I will not sell or furnish intoxicating liquors to any person who is not known to me personally, or duly identified, nor to any minor, intoxicated person, or persons who are in the habit of becoming intoxicated, and I will make true, full and accurate returns to the county board of control the first Monday of each month of all certificates and requests made to or received by me as required by law during the preceeding month; and such returns shall show every sale and delivery of such liquors made by or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the intoxicating liquors sold or delivered to any and every person as returned." Upon taking said oath and filing bond as hereinbefore provided, the county board of control shall issue to him a permit authorizing him to keep and sell intoxicating liquors, as in this act provided; and every permit so granted shall specify the building, giving street and number, or location, in which intoxicating liquors may be sold by virtue of the same, and the length of time in which the same shall be in force, which in no case shall exceed twelve months. Permits granted under this act shall be deemed trusts reposed in the recipients thereof not as a matter of right, but of confidence; and may be revoked upon sufficient showing by order of the county board of control; and upon the removal of any county dispenser, or upon demand of the county board of control, he shall immediately turn over to the said county board of control all liquors and other property in his possession belonging to the State or county. Said county board of control shall be charged with the duty of prosecuting the county dispenser, or any of his employees, who may violate any of the provisions of this act.

SEC. 10. The county board of control shall use as their office the office of the county commissions of their respective counties and the clerk of the board of county commissioners

shall serve as their clerk. They shall preserve, as part of the records and files of their office, all petitions, bonds and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. The county board of control shall designate or provide a suitable place in which to sell the liquors, and shall furnish or grant permits to purchase from the State commissioner such liquors as shall be necessary. The members of the county board of control shall meet once a month, or oftener on the call of the chairman, and for their service they shall each receive a per diem of $2, and 5 cents mileage each way, and their clerks shall receive $2 per day for the days actually employed as such, but they shall not receive compensation for more than thirty days in any one year. They shall, upon the approval of the State board of control, employ such assistants for the county dispenser as may be necessary. The county dispenser and his associates shall receive such compensation as the State board of control may determine. All profits after paying all expenses of the county dispensary shall be paid one-half to the county treasury and one-half to the municipal corporation in which it may be located, such settlements to be made monthly.

SEC. 11. Before selling or delivering any intoxicating liquors to any person, a request must be presented to the county dispenser, printed or written in ink, dated of the true date, stating the age and residence of the signer, for whom and whose use the liquor is required, the quantity and kind requested, and his or her true name and residence, and, where numbered, by street and number, if in a city, and the request shall be signed by the applicant in his own true name and signature, attested by the county dispenser or his clerk who receives and files the request, in his own true name and signature and in his own handwriting. But the request shall be refused if the county dispenser filling it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess; or if the applicant is not so personally known to said county dispenser before filling said order or delivering said liquor, he shall require identification, and the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to an excess.

SEC. 12. Requests for the purchase of liquor shall be made upon blanks furnished by the county auditor, in packages of one hundred each, to the county dispensers from time to time as the same shall be needed and shall be numbered consecutively by the auditor. The

blanks aforesaid shall be furnished to the county auditor by the State board of control in uniform books like bank checks, and the date of delivery shall be endorsed by the county auditor on each book, and receipt taken therefor and preserved in his office. The county dispenser shall preserve the application in the original form and book, except the filling of the blanks therein, until returned to the county auditor. When return thereof is made, the county auditor shall endorse thereon the date of return, and file and preserve the same, to be used in the quarterly settlements between the county dispenser and the county treasurer. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such county dispensers.

SEC. 13. On or before the tenth day of each month, each county dispenser shall make full returns to the county auditor of all requests filled by him and his clerks during the preceding month upon blanks to be furnished by the State board of control for the purpose, and accompany the same with an oath, duly taken and subscribed before the county auditor or a notary public, which shall be in the following form, to wit: I, ————, being duly sworn, state on oath, that the requests for liquors herewith returned are all that were received and filled at my place of business under my permit during the month ————, 18—; that I have carefully preserved the same, and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required, and that no liquors have been sold or dispensed under my permit during said month except as shown by the requests herewith returned, and that I have faithfully observed and complied with the provisions of my bond and oath taken by me, thereon endorsed, and with all the laws relating to my duties in the premises.

SEC. 14. Upon failure of any county dispenser to make the returns to the auditor as herein required, it shall be the duty of said auditor to report such failure to the county board of control, and the said county board of control shall immediately summon said delinquent county dispenser to appear before them and show cause why his permit should not be revoked; and if the cause shall not be shown to the satisfaction of the county board of control, they shall immediately annul said permit and give public notice thereof; and the solicitor shall proceed to enforce the penalties prescribed in this act for such violation against said county dispenser at the next succeeding term of court of the county in which such permit is held, and any county dispenser who shall sell or dispense any intoxicating liquors after his permit shall have been revoked shall, upon conviction thereof, be fined not less than $500, and be imprisoned in the county jail for six months.

SECT. 5. Every county dispenser shall keep a strict account of all liquors received by him from the State commissioner, in a book kept for that purpose, which shall be subject at all times to the inspection of the circuit solicitor, any peace officer or grand juror of the county or of any citizen, and such book shall show the amount and kind of liquors procured, the date of receipt and amount sold, the amount on hand of each kind for each month. Such book shall be introduced by the party keeping the same, to be used as evidence on behalf of any prosecution against him, on notice duly served that the same will be required as evidence.

SEC. 16. The payment of the United States special tax as a liquor dealer, or notice of any kind in any place of resort or in any store or shop, indicating that intoxicating liquors are there sold, kept or given away, shall be held to be *prima facie* evidence that the person or persons paying said tax and the parties displaying such notices are sellers of intoxicating liquors, and unless said person or parties are selling under permit as prescribed by this act they shall be punished as provided for by this act.

SEC. 17. Licensed druggists conducting drug stores and not holding permits, and manufacturers of proprietary medicines, are hereby authorized to purchase of county dispensers of the counties of their residence intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. Such permit holders shall not charge such licensed druggists over 10 per cent. net profits for liquors so sold. Such purchaser shall keep a record of the uses to which the same are devoted, giving the kind and quantity so used and on or before the 10th of each calendar month they shall make and file with the county auditor, and with the county board of control, sworn reports of the preceding calendar month, giving a full and true statement of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the names of county dispenser from whom the same was purchased and the dates and quantities so purchased, together with an invoice of each kind still in stock and kept for such compoundings. If said licensed druggist sell, barter, give away or exchange, or in any manner dispose of, said liquors, or use the same for any purpose other than authorized in this section, he shall upon conviction before any Court of General Sessions forfeit his license and be liable to all penalties, prosecutions and proceedings at law and in equity provided against persons selling without permit, and upon such convictions the clerk of court shall, within ten days after such judgment or order, transmit to the board of pharmaceutical examiners the certified record thereof, upon receipt of which the said board shall strike the name of the said druggist from the list of pharmacists and cancel his certificate:

Provided, That nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage which is intoxicating in its character.

SEC. 18. That the sum of fifty thousand dollars, if so much b necessary, is hereby appropriated for the purpose of purchasing a of supplying liquors to be distributed to county dispensers un the provisions of this act, to be expended by the State treasurer on the requisition of the State commissioner with the approva the State board of control: Provided, That the amounts advar to each county dispenser shall be considered loans to be refu out of the profits derived from the sales of liquors by the co dispenser therein.

SEC. 19. If any person shall make any false or fictitious sig ture or sign any name other than his or her own to any paper quired to be signed by this act, without being authorized so to or make any false statement in any paper, request or applicatio signed to procure liquors under this act, the person so offending shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars and costs of prosecution, or be imprisoned not less than thirty days nor more than six months.

SEC. 20. If any county dispenser or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall upon conviction therefor be punished as provided by law for perjury. If any county dispenser, under the law, shall purchase or procure any intoxicating liquors from other person than the State commissioner, or make any false return to the county auditor, or use any request for liquors for more than one sale, in any such case he shall be deemed guilty of a misdemeanor, and upon conviction punished by a fine of not less than $100 nor more than $500, and imprisoned in the county jail for not less than ninety days nor more than one year for each offense.

SEC. 21. Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club room or other place in which any intoxicating liquors are received or kept for the purpose of barter or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every person who shall barter, sell, or assist or abet another in bartering or selling, any intoxicating liquors so received or kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than one hundred dollars nor more than five hundred dollars,

and by imprisonment in the county jail not less than ninety days nor more than one year.

SEC. 22. All places where intoxicating liquors are sold, bartered or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances; and if the existence of such nuisance be established either in a criminal or equitable action, upon the judgment of a court, or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or any constable of the proper county or city where the same is located, shall be directed to shut up and locate such place by taking possession thereof, if he has not already done so, under the provisions of this act; and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance, and such personal property so taken possession of shall, after judgment against said defendant, be forthwith confiscated to the State, and the owner or keeper thereof shall upon conviction, be adjudged guilty of maintaining a common nuisance, and shall for the first offense, be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail of not less than ninety days nor more than one year, and for each successive offence be punished by imprisonment in the penitentiary for a period not exceeding two years nor less than one year.

SEC. 23. The Attorney General, or his assistant, the circuit solicitor, or any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the Attorney General, his assistant or the solicitor of the circuit, upon information or belief, and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquors, particularly describing the same, are kept for sale or are sold, bartered or given away on the premises, particularly describing the same where such nuisance is located contrary to law, the court or judge shall at the time of granting the injunction issue his orders, commanding the officer serving the writ of injunction at the time of such service, diligently to search the premises and carefully to invoice all articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the fees now allowed by law for serving an injunction. If such officer upon such search shall find upon such premises any intoxicating liquor, or li-

quors of any kind, in quantity going to show it was for purpose of sale or barter he shall take the same into his custody and turn over the same to the sheriff of the county, who shall securely hold the same to abide the final judgment of the court in the action (the expenses for holding to be taxed as part of the costs of the action), and such officer shall also take possession of all personal property found on such premises, and turn over the same to the sheriff of the county who shall hold the same until the final judgment in the case. The finding of such intoxicating liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act shall be *prima facie* evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them shall not be taken from the custody of the officer in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending; and final judgment in such proceedings in favor of the plaintiff, shall, in all cases, be a bar to all suits against such officer or officers for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention thereof. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first offense by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year. In case judgment is rendered in favor of plaintiff in any action brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff, and against the defendants therein, which attorney's fee shall be taxed and collected as the other costs therein, and when collected, paid to the attorney or attorneys of the plaintiff therein: Provided, if such attorney be the State's attorney or solicitor, such attorney's fee shall be paid into the county treasury. In contempt proceedings arising out of the violations of any injunction granted under the provisions of this act, the court, or in vacation, the judge thereof, shall have the power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the State. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral, or in the form of affidavits, or both; the defendant may be required to make answers to interrogatories, either written or oral, as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpœnas for witnesses, and except as above set forth the prac-

tice in such contempt proceeding shall conform as nearly as may to the practice in the Court of Common Pleas.

SEC. 24. It shall be the duty of sheriffs, deputy sheriffs and constables having notice of the violation of any of the provisions of this act to notify the circuit solicitor of the fact of such violation, and to furnish him the names of any witnesses within their knowledge by whom such violation can be proven. If any such officer shall wilfully fail to comply with the provisions of this section, he shall, upon conviction, be fined in a sum not less than one hundred dollars nor more than five hundred dollars; and such conviction shall be forfeiture of the office held by such person; and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

SEC. 25. No person shall knowingly bring into this State, or knowingly transport from place to place within this State by wagon, cart or other vehicle, or by any other means or mode of carriage, any intoxicating liquors with the intent to sell the same in this State in violation of law, or with intent that the same shall be sold by any other person, or to aid any other person in such sale, under a penalty of $500 and costs for each offense, and in addition thereto shall be imprisoned in the county jail for one year. In default of payment of said fine and costs the party shall suffer an additional imprisonment of one year. Any servant, agent or employee of any railroad corporation, or of any express company or of any persons, corporations or associations, doing business in this State as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation, at any place other than the usual and established stations, wharves, depots or places of business of such common carriers within some incorporated city or town, where there is a dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of $50 and imprisonment for thirty days for every such offense: Provided, That said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation. All such liquors intended for unlawful sale in this State may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. And any steamboat, sailing vessel, railroad, express company, or other corporation, knowingly transporting or bringing such liquor into the State, shall be punished upon conviction by a fine of five hundred dollars and costs for each offense. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company.

SEC. 26. The Governor shall have authority to appoint one or

more State constables at a salary of $2 per day and expenses when on duty to see that this act is enforced, the same to be charged to the expense account of the State commissioner.

SEC. 27. No law now in effect prohibiting the sale of intoxicating liquors in any of the counties or towns of this State is repealed by this act.

SEC. 28. All acts or parts of acts inconsistent with this act are hereby repealed.

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UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

District of South Carolina—Fourth Circuit.

Ex Parte C. B. SWAN, *Petition for Habeas Corpus.*

ARGUMENT OF D. A. TOWNSEND,
Attorney-General of South Carolina, Representing the Petitioner.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

District of South Carolina—Fourth Circuit.

Ex Parte C. B. SWAN, *Petition for Habeas Corpus.*

ARGUMENT OF D. A. TOWNSEND,
Attorney-General of South Carolina, Representing the Petitioner.

I.

Statement of Facts.

Your petitioner was ruled and attached for contempt by the Circuit Judge for seizing as State Constable a barrel of liquor in the hands of D. H. Chamberlain, Receiver of the South Carolina Railway Co., under the Act of the Legislature of South Carolina, known as the Dispensary Law, and now seeks discharge from his imprisonment. The facts of the case are as follows: The said law was approved 24th December, 1892, became a law on the 12th January, 1893, and went into active operation the 1st day of July, 1893.

It appears from the statement of the facts made by the Circuit Judge in his opinion accompanying the petition herein, and from the return of your petitioner as respondent in the original proceeding for contempt, that the liquor in question had been shipped in a barrel during the month of April, 1893, by Lowenstein Brothers, liquor dealers, from Statesville, North Carolina, to their agent, O'Neill, at Charleston, S. C., to be sold; that it was, at the time of seizure, to wit, on the 1st day of August, 1893, in the depot of the Receiver of the South Carolina Railway Company, about to be delivered to such agent for sale, or to be disposed of for some other purpose, contrary to such law under which it was seized; that at the time of its seizure it was still in transit to its place of sale, and in process of being transported from the depot to some other place in the said city; that it was clearly impressed with all the characteristics of adaptation and intended use for such purpose, prohibited by such law; that the barrel had no certificate upon it as required by said law; that it was seized by your petitioner as a duly commissioned State Constable under the authority of said law without a warrant; that because of his inability to ascertain then the owner of the liquor, he was delayed in taking formal proceedings against it until he was restrained by the order of the Circuit Judge in the proceedings had before him for contempt in so seizing it; and that at the time of such seizure of the liquors there was no dispensary in the city of Charleston.

II.

Points and Authorities.

There are three propositions of law to be sustained to show that the petitioner is entitled to his discharge herein:

First: The Circuit Judge had no jurisdiction of the matter involved in the proceedings for contempt.

Second: He exceeded his authority in attaching the petitioner for contempt.

Third: He exceeded his authority in punishing the petitioner with both fine and imprisonment.

The first proposition is sustained upon the following ground and authorities:

Your petitioner was attached for contempt while discharging his duty as an officer of the State, in the execution of its valid police law, and in doing so he was not violating the Constitution or laws of the United States, nor any order, process or decree of any Court or Judge thereof. The Circuit Court had no jurisdiction of the matter.

U. S. Rev. Stat., Sec. 753, and cases noted.
Gould & Tucker's Notes to Sec. 753, p. 219.

That the Dispensary Law is a valid police law will be shown in the consideration of the second proposition. It is to be observed that the Circuit Judge bases his judgment solely upon the ground that the petitioner, as State Constable, had no right to seize the liquor without a warrant, as such seizure was forbidden by the Constitution of the State; and only for that reason holds that such seizure was an improper interference with the Receiver.

Also, that the Circuit Judge concedes that the Receiver "as a common carrier is bound to respect and obey the laws of the State."

The second proposition, like the first, rests finally upon the ground that the Dispensary law is a valid police law, and is not limited in its operation by any Constitutional restraints.

The validity of the Dispensary law, both in its general and particular provisions, will be shown by the following considerations:

I. The Legislature of the State is that department of the government in which the sovereign police power of the people is exclusively lodged, and it is restrained in the exercise of such power only by the provisions of the State Constitution, which expressly, or by necessary implication, limit it, and cannot be restrained by Federal law.

Tiedeman's Limitations of Police Power, pp. 5–13, says:

"The Legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power are to be found the limitations of the police power. Whether there be other limitations or not, the most important and the most clearly defined are to be found in the National and State Constitutions. Whenever an Act of the Legislature contravenes a Constitutional provision, it is void, and it is the duty of the Courts so to declare it. But is it in the power of the judiciary to declare an Act of the Legislature void because it violates some abstract rule of justice, when there is no Constitutional prohibition? Several eminent Judges have more or less strongly insisted upon the doctrine that the authority of the Legislature is not absolute in those cases in which the Constitution fails to impose a restriction.

* * * * * * * * * * *

But notwithstanding the opinions of these eminently respectable Judges, the current of authority, as well as substantial Constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law, that the Courts, in the performance of their duty to confine the legislative department within the Constitutional limits of its power, cannot nullify and avoid a law simply because it conflicts with the judicial notions of natural right or morality or abstract justice. * * * *

While it is true that the Courts have no authority to override the legislative judgment on the question of expediency or abstract justice in the enactment of a law, and if a case arising under the Statute should come up before them for adjudication they are obliged by their official oaths to enforce the Statute, notwithstanding it offends the commonest principles of justice, it is nevertheless true that a law which does not conform to the fundamental principles of free gov-

ernment and natural justice and morality will prove ineffectual and will become a dead letter.

* * * * * * * * * * *

"But these are considerations which can alone be addressed to the legislative department of the government. If an unwise law has been enacted, which does not infringe upon any Constitutional limitation, the only remedy is an appeal to the people directly, or through their representatives, to repeal the law. The Courts have no authority to interpose.

* * * * * * * * * * *

"And in all such cases it is the duty of the Courts to determine whether the regulation is a reasonable exercise of a power which is generally prohibited by the Constitution. It is the province of the law-making power to determine when the exigency exists for calling into exercise the police power of the State, but what are the subjects of its exercise is clearly a judicial question."

See Note 1, p. 7.

Black on Intoxicating Liquors, § 27:

"In the nice adjustment of rights and powers between the States of the Union, questions frequently arise which require a determination of the relative scope of the police power of a State and the authority vested in Congress. * * * If the police power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State and its exercise for the regulation of the property and actions of its citizens cannot well constitute an invasion of National jurisdiction or afford a basis for an appeal to the protection of the National authorities. Thus the United States Supreme Court has expressly declared that neither the Fourteenth Amendment—broad and comprehensive as it is—nor any other of the amendments to the Constitution was designed to interfere with the police power of the States. And the same tribunal, admitting that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Federal Constitution, concedes that 'all those powers

that relate to merely municipal legislation, or what may, perhaps more properly, be called internal police, are not thus surrendered or restrained, and consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.'"

The same authority, Section 39, says:

"If the power of the State to prohibit the manufacture and sale of intoxicating liquors be conceded, and it is no longer open to question, it will follow inevitably that the power of the State to regulate the sale of such articles, and to impose conditions and burdens and responsibilities upon those who desire to engage in the traffic, is practically unlimited. This principle, which is recognized by the authorities as a necessary truth, will furnish a test for determining the validity of many of the laws which have been enacted by way of restriction upon the liquor traffic, and will show the necessity of pointing to a very clear infraction of some constitutional guaranty."

See *Western Union Tel. Co.* vs. *Pendleton*, 122 U. S., 347, 359; *New Orleans Gas Light Co.* vs. *Louisiana Light Co.*, 115 U. S., 650, 661; Cooly Const. Lim., 574; *Barbier* vs. *Connolly*, 113 U. S., 27; *City of New York* vs. *Miln*, 11 Peters, 102, 139.

Crowley vs. *Christensen*, 137 U. S., 91:

"It" (sale of liquor) "is a question of public expediency and public morality, and not of Federal law. The power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. * * * The manner and extent of regulation rest in the discretion of the governing authority." * * * "That authority may vest in officers as it may deem proper the power of passing upon applications for permission to carry it on and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the Courts of the United States."

Trageser vs. *Gray*, 73 Maryland, 250:

"We are unable to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a State. Such power is original, inherent and exclusive; it has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society."

Giozza vs. *Tiernan*, Supreme Court Reporter, Vol. 13, 721, this Court said:

"Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the Legislature of a State except those imposed by its written Constitution."

In the License Cases, 5 How., 504, Mr. Justice Grier said:

"* * * The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority." (pp. 631, 632.)

In the same case, (License Cases,) Mr. Justice McLean said:

"A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power. The acknowledged police power of a State extends often to the destruction of property."

In *Mugler* vs. *Kansas*, 123 U. S., 660, this Court said:

"But by whom or by what authority is it to be determined whether the manufacturer of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they

are permitted to do as they please. Under our system, that power is lodged with the legislative branch of the government. It belongs to that department to exert what is known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of public morals, the public health or the public safety." * * * "If, therefore, a State deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific and manufacturing purposes to be necessary to the peace and security of society, the Courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation."

State vs. *Wheeler*, 25 Conn., 297, 298, says:

"The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that under a written Constitution like ours, in which the three great departments of government, the executive, legislative and judicial, are confided to distinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the Constitution itself, it is competent for the judicial department to deprive the Legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the Legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the Constitution contains no restriction upon its exercise in regard to the subject of it. There is, however, no occasion to pursue this topic. The law in question is in our opinion obnoxious to no objection which could be derived from the establishment of the doctrine advanced by the defendant. It is not different in its character, although it may be more stringent in some of its provisions, from those numerous laws which

have been passed in almost all civilized communities, and in ours from the earliest settlement of our State, regulating the traffic in spirituous liquors, and which are based on the power possessed by every sovereign State to provide by law, as it shall deem fit, for the health, morals, peace and general welfare of the State; and which, whatever may have been thought of their expediency, have been invariably sustained as being within the competency of the Legislature to enact."

2. The provisions of the Federal and State Constitutions which limit legislative power are only intended to protect the individual citizen against any infringement upon his private rights by the public, and only apply when there is such infringement.

But in regard to the traffic in intoxicating liquors, no citizen has the inherent right to sell the same.

Black on Intoxicating Liquors, § 36, p. 47:

Speaking of the limitations by Federal Constitution and referring to the Fourteenth Amendment as to privileges and immunities of citizens of the United States," says:

"But the right to sell intoxicating liquors is not one of the privileges or immunities here contemplated."

Giozza vs. *Tiernan*, 13 Sup. Ct. Rep., 721:

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the National Government and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship."

In *Bartemeyer* vs. *Iowa*, 18 Wall., 129, it is said that prior to the adoption of the Fourteenth Amendment, State enactments regulating or prohibiting the traffic in intoxicating liquors raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own Constitutions or by the general principles supposed to limit all legislative power.

Referring to the contention that the right to sell intoxicating liquors was secured by the Fourteenth Amendment,

the Court said that "so far as such right exists, it is not one of the rights growing out of citizenship of the United States."

Mugler vs. *Kansas*, 123 U, S., 623:

"Such a right" (the right to sell intoxicating liquors) "does not inhere in citizenship, nor can it be said that government interferes with or impairs any one's Constitutional rights of liberty or property when it determines that the manufacture and sale of intoxicating drinks, for general or individual use as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

Crowley vs. *Christensen*, 137 U. S., 91:

"There is no inherent right in a citizen to thus sell intoxicating liquors by retail: it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or permitted under such conditions as will limit to the utmost its evils."

3. It follows, therefore, as a general conclusion from the two foregoing propositions, that the Constitutional provisions, which are the bulwarks of private rights against public power, do not apply in the matter of the police regulation of the liquor traffic by the State, and the Legislature is wholly unlimited in the exercise of its power, save by its discretion as to the extent and manner thereof.

4. In the light of this general conclusion of law, let us now proceed to show that the Dispensary Law in question is a valid police law.

It is not necessary to cite any authority to show that the trade in intoxicating liquors is a matter fully within the police power of the State, and that there is a necessity for the exercise of such power in regard thereto. The validity of this Dispensary Law, both in its general purpose and scope and in its particular provisions, is shown by the authority hereinbefore cited. But we will consider the Constitional objections that have been urged against it.

(*a*) The only general objection urged against the Dispensary Law is that it creates a monopoly in the State.

This is not a sound objection. As has been shown, no citizen of this country has the right to sell intoxicating liquors, and hence the people have no common right to engage in that trade as a business. When the Legislature, in the exercise of the police power, sees fit to commit the control of that trade to the State, under such regulations as its discretion suggests, it does not deprive any citizen of his rightful business and does not create a monopoly in the proper and objectionable sense of that word.

Besides, as the prohibition or regulation of such trade rests entirely within the police power of the Legislature, it may make the license to sell intoxicating liquors exclusive in the State or in any corporation or citizen when deemed necessary. On this ground, Mr. Tiedeman, while he holds that unqualified prohibition is unconstitutional even in the face of the current of authority, as he admits, yet emphatically sustains such monopoly by the State.

Tiedeman's Lim. of Police Power, p. 318, says:

"There is no doubt that a trade or occupation which is inherently and necessarily injurious to society may be prohibited altogether; and it does not seem to be questioned that the prosecution of such a business may be assumed by the government and managed by it as a monopoly. * * * If it is lawful for the State to prohibit a particular business altogether, or to make a government monopoly of it, the pursuit of such a business would, if permitted to any one, be a privilege or franchise, and, like any other franchise, may be exclusive. This is but a logical consequence of the admission that the State has the power to prohibit the trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly."

The State vs. *Brennan's Liquors*, 25 Conn., 278, sustains this principle, that the State can reserve the power to monopolize the sale of intoxicating liquors, as a part of its police regulation of it. In that State "an Act for the suppression of intemperance" provided the exclusive sale of liquors by the towns, through agents appointed for that purpose, and it was held to be valid. The Supreme Court gives the following clear utterance on the point: "It is finally said

that the public have no right to monopolize the sale of ardent spirits. The object of the Legislature in authorizing a sale by a public agent for certain purposes was not to raise a revenue for the town, but to accommodate certain persons with spirits for particular purposes, and at the same time to guard against the evils resulting from an indiscriminate sale by all persons and for all purposes." * * * * Referring to the power and propriety of legislation as a police regulation of evils, among them the sales of liquors, it adds: "Courts of justice have nothing to do with them, other than to discharge their legitimate duties in carrying into execution such laws as the Legislature may establish, unless indeed they find that the Legislature, in making a particular law, has disregarded the restraints imposed upon it by the Constitution of this State or of the United States. * * * * From the best examination we have been able to give this case, we are unable to say that for any of the reasons that have been assigned the Legislature, in passing the law in question, transcended any of its legitimate powers."

This doctrine of monopoly by the State of the trade in intoxicating liquors is sustained in principle by the Slaughter House cases, 16 Wall., 36.

(*b*) The objections made to the particular parts of the Dispensary Law are now to be considered.

1. It is urged that the clause of Section 25 which provides that "any servant, agent or employee of any railroad corporation, or of any express company, or of any persons, corporations or associations, doing business in this State as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation at any place other than the usual and established stations, wharves, depots or places of business of such common carriers within some incorporated city or town where there is a Dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of fifty dollars and imprisonment for thirty days for every such offense,"—is invalid because it violates the Fourteenth Amendment of the U. S. Constitution, for the reason it discriminates against such servants or agents as a class of the persons engaged in the transportation of liquors, in that it does not condition their

violation of the law upon their knowledge of the fact that the liquor is intended for unlawful sale, as the other clauses of the Section do as to others engaged in such business.

The Dispensary Law being a police law the Fourteenth Amendment cannot impair its provisions. Besides, there is no discrimination which makes the clause class legislation.

Barbier vs. *Connolly*, 113 U. S., 32:

"Special burdens are often necessary for general benefits —for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Trageser vs. *Gray*, 73 Maryland, 250:

"But in truth the valid exercise of the police power does not depend on any question of discrimination for or against particular persons or classes of persons. It is confided to the wisdom of the Legislature to make such application of it as the public welfare may require. In the case of occupations which may become injurious to the community they may prohibit them altogether, or they may permit them only in certain localities, and in certain towns and under certain restrictions, or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not all considered in the exercise of this power. They must yield when they are in opposition to the public good. And the Legislature is to determine what measures will best promote the public good in dealing with these matters. * * * * * It has been maintained that

the appellant (Trageser) has rights under existing treaties which have been infringed by the denial of licenses to aliens. * * * If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is, that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a State. Such power is original, inherent and exclusive; it has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society."

(2) It is contended that the clause of Section 25 which provides that "all such liquors intended for unlawful sale in the State may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place" does not authorize such seizure without a warrant; and that if it does, it is invalid, being in violation of the Constitutional provisions as to unreasonable searches and seizures.

But such clause does authorize such seizure without a warrant, and it is not in violation of such Constitutional provisions.

This Section 25 in its first sentence provides that "no person shall . . . knowingly transport from place to place within this State . . . by any means or mode of carriage, any intoxicating liquors, with intent to sell the same in this State in violation of the law," etc., ... and then comes the following clause: "All such liquors intended for unlawful sale in this State may be seized in transit and proceeded against as if it were unlawfully kept and deposited in a place." How it shall be so proceeded against is previously provided in the Act in Sections 22 and 23, wherein it is required that there must be either a civil or criminal action against the owner for nuisance, and the liquor seized is to be placed in the hands of the Sheriff to await the result, and upon judgment therein against the owner the liquor is to be confiscated.

In the former Sections, 22 and 23, a warrant is expressly required to seize such unlawful liquor. Under said clause

of Section 25 it will be seen that no warrant is expressly required.

The question, then, is, does such clause of Section 25 authorize the seizure of such liquor without a warrant?

The Circuit Judge decided that such seizure without a warrant was unlawful and committed your petitioner solely upon that ground. He concedes that if the clause had expressly provided that such seizure could be made without warrant, then the seizure would have been lawful if otherwise valid. But he contends that without such express provisions such seizure was unlawful, which in effect decides that the Legislature did not intend to authorize such seizure without warrant. In this rigid construction there was error. The real point is, what did the Legislature mean by the language of the clause? Construing the whole Act together, and particularly this clause with the preceding part of Section 25 and with Sections 22 and 23, as should be done, it is plain that the Legislature did expressly require that when the liquor to be seized is deposited in some locality of business a warrant should be first taken out, as there is opportunity for such formal proceeding and no danger of the liquor being removed while the warrant is being obtained; but that it intentionally omits such requirement of a warrant when the liquor is in transit, and in process of being transported probably out of reach and the owner is not then known, and there is a necessity for immediate action, which would make it absurd to wait for such formal proceeding. This view is emphasized by the fact that the clause considered is a part of the Section 25, which relates exclusively to liquor in transportation. Such construction is in consonance with the rules of interpretation.

The legislative intention must be ascertained by considering the whole Statute together.—Sutherland on Stat. Construction, Sec. 239. Each clause must be interpreted in harmony with the whole Act.—*Ib.*, Sec. 241. And in comparison with other subordinate parts.—*Ib.*, Sec. 262. No part must be so narrowly construed as to lead to absurdity.—*Ib.*, Sec. 243. The Court is at liberty to look to extraneous facts of general knowledge to ascertain the true meaning of the clause, especially such as show the necessity

for such purpose.—*Ib.*, Secs. 292, 301. The expression of a requirement in one part of a Statute is not a negation of its intentional omission in another part where it is otherwise manifest.—*Ib.*, Sec. 325. While the clause is of a penal character and to be strictly construed, yet it must be so construed as to effect the intention of the Legislature.—*Ib.*, Secs. 350, 354.

The implication, therefore, is irresistible that the Legislature intended by this clause to authorize the seizure of such liquor while in transit without a warrant. If so, that implication is as much a part of the Statute as if it had been expressed.—Sutherland on Stat. Con., Sec. 334.

The clause so construed is not in violation of State Cons., Art. 1, Sec. 22, as the Circuit Judge holds. This provision of the Constitution of South Carolina is substantially the same as the provisions of the Constitution of the United States and of Maine, Massachusetts and Vermont, in regard to searches and seizures. In the Statutes of each of those States, as to intoxicating liquors, there is an express provision allowing the proper officer to seize the liquor intended for unlawful sale and to arrest the keeper of it "without warrant," and then to proceed formally in the matter, to its adjudication.

These provisions of Statutes of Maine, Massachusetts and Vermont as to arrest and seizure "without a warrant" have been construed by the highest Courts in those States.

In *Jones* vs. *Root*, 6 Mass., 435, it was distinctly decided that the Section "which authorizes officers, without warrant, to arrest any person found in the act of illegally selling or transporting intoxicating liquors, and to seize the liquors, vessels and implements of sale in the possession of such person and detain them in some place of safe keeping until warrants can be procured for the trial of the person and the seizure of the liquors, is Constitutional."

In *State* vs. *O'Neil*, 58 Vt., 140, it is said that the Section of the Statute there under consideration "gives the officer power to seize without warrant liquor found under circumstances warranting the belief that it is intended for sale or distribution." It holds that the Section is Constitutional, and that a seizure of liquor made thereunder without war-

rant was lawful. Its following clear announcement is applicable here:

"The Section simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the Constitution as an instrument intended by the owner or possessor for a use unlawful by express Statute and dangerous to the peace, health and good morals of the community. * * * It cannot be doubted in this State since the case of *Spalding* vs. *Preston*, 21 Vt., 9, and has not been elsewhere, so far as we are aware, that articles or instrumentalities once impressed with the characteristics of *adaptation* and *intended use* for purposes prohibited by law, and contrary to public peace, health or morals, are subject to summary seizure under statutory or even general police regulations."

In that case of *Spalding* vs. *Preston*, *supra*, the officer seized without warrant pieces of German silver, ready to be coined into counterfeit money; and it was held that the seizure was lawful, for the double purpose of using the articles as evidence against the offender and of preventing its circulation. It laid down the broad principle that "the officers of government have authority, derived from the general rights of the government, without any statute whatever upon the subject, to exercise all necessary force for the prevention of crime, either by the arrest of individuals or by the seizure and detention of the instruments for committing crime."

In re Powers, (25 Vt., 261,) was a case of arrest without warrant for intoxication, under Statute "to prevent traffic in intoxicating liquors," which provided that proper officers should arrest, without warrant, any person intoxicated. Such arrest was held to be lawful and not contrary to the Constitutional provision in regard to seizures of person and property.

This interesting and instructive language is used in regard to such provision of the Constitution: "This seems to be directed against general warrants, and general search warrants in particular, not specifically describing the persons, places or property to be searched or arrested. This class of

warrants, which in troublous and unsettled periods in English history were issued to a very alarming extent by their Secretaries of State, and other magistrates perhaps, was prohibited, at the final settlement of the realm upon the Prince of Orange and the Hanover family, I think, if not earlier; and similar provisions have been transferred to the United States and to most of the State Constitutions. It is very obvious that this proceeding is not of that character. And it has never been supposed to prohibit arrests by private persons or without warrants in that class of cases where delay would be perilous. Necessity is the first law of government, as well as of nature, and is not to be abrogated by implication."

Story on the Constitution (Vol. 2, Sec. 1902,) states substantially the same historical reason for this provision in the Constitution of the United States, and shows the like limit of its purpose.

The great work—Cooley's Constitutional Limitations, p. 365, note—gives the same historical review of these Constitutional provisions in the State and Federal Constitutions, and shows the same cause for the adoption thereof.

State vs. *McCann*, 59 Me., 383, in regard to a similar statutory provision in that State, allowing a seizure of intoxicating liquors or vessels containing them, without warrant, holds: "By this Statute no new or additional authority is given to search. It is only to seize. It is to seize what the officer may be enabled to seize without unreasonable searches prohibited by the Constitution. The Act, to this extent, is Constitutional."

State vs. *Dunphy*, 79 Me., 104, referring to the Section of the Statute in that State which authorizes an officer, when ever he could seize unlawful liquors with a warrant to do so without a warrant, says:

"Experience suggested the necessity of this provision, for not unfrequently liquors liable to seizure and seen by an officer, who did not then have a warrant, were not readily found after a complaint and warrant had been made and obtained. Hence, to meet this emergency, this provision was enacted to allow an officer, as in analogous cases, by virtue of his official capacity, to act at once by taking the

liquors into his possession and keeping them until he could procure a warrant for their seizure," &c.

Your petitioner being a duly appointed and commissioned State Constable, under the Statute he was required thereby "to see that this Act is enforced."—Sec. 26.

So he was empowered and compelled by his official duty to seize the said barrel of unlawful liquor without warrants and hold the same.

5. Having shown that the Dispensary law is a valid police law, and that your petitioner, as State Constable, was authorized to seize unlawful liquor while in transit and being transported from place to place within the State, it only remains to show that the liquor was in transit and being so transported.

The words of Section 25, "transported from place to place," include such transportation from one place to another in the same town.

Commonwealth vs. *Waters*, 11 Gray, (Mass.) 81, construes similar terms of the Statute of that State, and, after allowing some qualification thereof, says:

"But the transportation from one place, whether it be a shop, warehouse, railroad depot, or building used for any purpose whatever, of which the owner has no possession and in which he has no interest, to a store of his own in which he transacts his usual business, is a thing altogether different in itself, comes within the very words of the prohibition, and affords the aid to one who contemplates the commission of an offense which it is the special object and purpose of this provision of the Statute to discourage and repress."

In that case a carrier was convicted of transporting liquor from a depot to the shed of the owner, in the same town.

State v. *Campbell*, 40 N. W. Rep., 100, construing language in the Statute of Iowa similar to that used in Section 5 of Dispensary Law, holds:

"The carrying of liquors from wholesale dealers to retail dealers in the same city is a conveying, within the meaning of such Statute, imposing the penalty for conveying the liquors 'from one place to another within the State.'"

"The time during which the right "(stoppages in transit)" exists, therefore, is during the whole period of the transit

from the vendor to the purchaser, or the place of destination as designated to the vendor by the buyer, and the transit continues so long as the goods remain in the possession of the middleman, whether he be the carrier, either by land or water, or the keeper of a warehouse or place of deposit connected with the transmission and delivery of the goods.—Smith's Mercantile Law, 683.

Note, citing Walworth, Chancellor, in *Coville* vs. *Hitchcock*, 23 Wen., 613, is as follows: "Goods may be stopped so long as the transit continues, whether by land or water, from the consignor to the consignee, and whether they are in the hands of the carrier, warehouse keeper, wharfinger or any middleman connected with the transportation."

Certainly, *prima facie* the barrel of liquor belonged to Lowenstein Brothers, was intended for unlawful sale, and was in process of transportation by them through their agent from the depot to some other place in the city of Charleston. This brings the case under the first clause of Section 25, and makes it a violation of the law by them as persons knowingly transporting such liquor from place to place within the State, and subjects the liquor to seizure "in transit" as unlawful liquor.

6. It having been established that the Dispensary Law is a valid police law, and that it cannot be held to violate any Federal law, or any order or decree of a Federal Court, or any provision of the Constitution of the State, the conclusion must be that the Circuit Judge had no jurisdiction of the matter, or at least that he exceeded his authority when he attached your petitioner for contempt.

7. But if the Circuit Judge had jurisdiction and authority at all to attach the petitioner for contempt, he must be considered as having exceeded his authority in punishing him with both imprisonment and payment of the costs.

Section 725, U. S. Rev. Statutes, prescribes that the punishment for contempt shall be "by fine or imprisonment."

The Circuit Judge ordered that the petitioner be imprisoned until he return to the custody of the Receiver the barrel of liquor taken by him from the warehouse without warrant of law, and after surrendering the barrel of liquor he suffer a further imprisonment thereafter in said County

jail for three months, and until he pay the costs of these proceedings. The costs being a pecuniary punishment is a fine.—Anderson's Law Dict., Title Fine.

The Statute must be strictly construed, and is "a limitation upon the manner in which the power may be exercised, and must be held to be a negation of all other modes of punishment."

Ex parte Robinson, 19 Wall., 512.
U. S. vs. *Atchison*, 16 Fed. Rep., 853.

D. A. TOWNSEND, *Attorney-General,*
For Petitioner.

150 US 637

150 U S 637

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. . Original.

EX PARTE C. B. SWAN, Petitioner.

Rule to Show Cause why Writ of Habeas Corpus should not Issue.

REPLY of D. A. TOWNSEND, Attorney General of South Carolina, to the Argument of Respondent's Attorney.

There are only two points in the argument of respondent's counsel to which reply is submitted.

I.

The position taken by respondent's counsel, that the liquors in question could not be seized by your petitioner, because it was in the custody of the law, is untenable.

It is admitted that all the property of the South Carolina Railway Company, when it passed into the hands of the receiver, went into the custody of the law, and that the receiver could not be arrested for obeying the order of the court in reference thereto; nor could his possession of the property be interfered with by seizure under execution. But the liquor in question was not in the custody of the law simply because it happened to be in the temporary possession of the receiver. It was no part of the property of the railway company that had been taken into the custody of the law, under and by virtue of the receivership thereof. The receiver had transported

it as a common carrier, as the property of Lowenstein Bros., to Charleston, and there held it as their property for delivery to them as the owners. He sustained no other relation to the liquor than that which the railway company itself sustained to it, to wit, that which imposed the duty upon him to deliver it, if not prevented by the law, and allowed him to charge proper freight thereon.

So the receiver in this case being a common carrier, who had performed his duty as such in transporting the liquor, and then held it as the property of another, to be delivered upon payment of proper charges, had no higher rights in regard to the same than any other warehouseman would have. This proposition is conceded by the judge below, and is sustained upon reason; and no warehouseman so holding unlawful liquor as the property of another to be delivered, would be permitted to hold the same against seizure under a valid police law, declaring the same to be contraband. That such is the law, the authorities show.

Black on Intoxicating Liquors, section 353, says:

"And so liquor in the possession of a warehouseman, but intended by the owner for unlawful sale within the State, when it shall reach its destination is liable to be seized, and the lien of the warehouseman is no bar to the proceeding, although he has no intention to violate the law."

The State *v.* Intoxicating Liquors, 50 Me., 506, holds the same.

State *v.* O'Neill, 58 Vt., 140, says, in reference to such seizure, considered as an interference with interstate commerce:

"If an express company, or any other carrier or person, natural or corporate, has in possession, within this State, an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure, for the protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession, within this State, clothing infected with the small-pox, or yellow fever, or tools with which it was intended to commit a burglary, the State government should be powerless

to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought, in the ordinary course of business, from another State."

* * * * *

"If it were competent for persons, or companies, to become superior to State laws and police regulations, and to override and to defy them, under the shield of the Federal Constitution, simply by means of conducting an interstate traffic, it would, indeed, be a strange and deplorable condition of things."

The State *v.* Creeden, 43 N. W. Rep., 673, holds:

"A railroad company receiving packages of whiskey consigned by a person without to a person within the State of Iowa, after the expiration of from six to fifteen days from the receipt of the various packages at the point of destination, is no longer a carrier, but becomes a warehouseman, and the liquors, if intended for illegal sale, may be seized in its freight depot and confiscated."

* * * * *

"Nor can the railroad company which was engaged with and aided him in the violation of the law defeat the proceeding and escape the judgment of the law, on the ground that it has a lien for trifling sums upon the liquors which it was keeping in violation of law."

It follows, therefore, that the liquor not being a part of the property of the railway company in the control of the court, and being the property of another, in temporary charge of the receiver or warehouseman, he could not properly hold it against the seizure by your petitioner, and the court could not protect him in refusing that obedience to a valid police law incumbent upon every citizen.

II.

The position taken by the respondent's attorney, that sec. 974, Rev. Stat. U. S., quoted by him, authorizes the punishment for contempt by both imprisonment and payment of the costs, is incorrect.

That section evidently refers to regular prosecutions for crimes, and has no reference to punishment for contempts under rule.

While sec. 725, Rev. Stat. U. S., plainly provides the exclusive punishment that the courts shall inflict in cases of contempt.

This section is as follows:

"The said courts (of the United States) shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It is apparent upon its face, that this section was intended to limit the powers of such courts in punishing contempts. And so the cases hold, which are cited in the opening argument on behalf of the petitioner.

Rapalje on Contempt, p. 13, after referring to the unlimited power of other courts in the punishment of contempt, alludes to the limitation upon such power in the courts of the United States, and says:

"On the other hand, the Circuit and District Courts of the United States, being the creatures of Congress, their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."

It must be concluded, therefore, either that, if the costs are a fine, as contended in the opening argument for the petitioner, they cannot be imposed as joint punishment with imprisonment; or that, if not considered a fine, they are added as a part of the punishment and are in excess of the limitation to mere imprisonment.

In either case, the express limitation upon the power to punish must control, and the order being in excess of authority, is void.

The Bryan Printing Company, Columbia, S. C.

OCTOBER TERM, 1899.

No. ——— ORIGINAL.

Ex Parte. IN THE MATTER OF C. B. SWAN, PETITIONER.

RULE TO SHOW WHY WRIT OF HABEAS CORPUS SHOULD NOT ISSUE.

BRIEF OF ARGUMENT FOR RESPONDENT.

JOS. W. HARNWELL,
Attorney for Respondent.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS.
[illegible]

SUPREME COURT OF THE UNITED STATES.

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PLEADINGS.

The petition for the writ does not contain a complete record of the proceedings in the Circuit Court.

In respondent's return the omission has been supplied by annexing to the return the order to show cause issued by the Circuit Court and served upon petitioner. This order will be found on page 4 of the return. The whole record is therefore before the Court.

STATEMENT OF THE CASE.

By an order of the Circuit Court of the United States for the District of South Carolina, filed on December 5th 1889, in the case of F. W. Bound vs. the South Carolina Railway Company, *et. al.*, a cause within the jurisdiction of that Court—Daniel H. Chamberlain was appointed Receiver of the South Carolina Railway Company.

By this order all of the property of the railroad Company was placed under the care and management of the Receiver and in the custody of the Court, and was protected by injunction. (Petition page 6) In the operation of said railroad as a common carrier there was delivered to the Receiver on the 12th of April, 1893, nearly three

months before the law commonly known as the Dispensary law of the State of South Carolina went into effect, a barrel of liquor shipped by citizens of North Carolina, at Statesville, in that State, to their agents at Charleston, in the State of South Carolina.

The barrel from the time of its arrival in Charleston on the day after its shipment remained in the Receiver's warehouse until the 1st of August, 1893, thirty days after the Dispensary law was of force.

The cause of this delay was some confusion as to the proper consignment of the goods.

On that day, C. B. Swan, the petitioner, entered the warehouse of the Receiver, seized the goods, took them out of the custody of the Receiver and deposited them in the jail of Charleston County in the care of the sheriff. The petitioner showed no authority either from the consignee or consignor of the goods. He produced no warrant, order or process of any Court whatever. The sole authority produced by him to the Receiver was his commission as a constable of South Carolina under the Dispensary Act. He did not inform the agent of the Receiver what disposition he intended to make of the goods. He took no steps after seizure to obtain a warrant for them. He acted upon his own motion, without legal advice, and without instructions from any person whomsoever in making the seisure.

On 7th of August, 1893, the Receiver filed his petition in the Circuit Court of the United States for the District of South Carolina in the cause in which the Receiver was appointed setting forth the above facts and praying that Petitioner C. B. Swan be attached and punished for contempt of Court in seizing the goods without warrant, and that he be compelled to restore them to the Receivers custody for delivery to the consignee.

To this rule petitioner made answer disclaiming any intent to commit a contempt of the Court, but justifying the seizure under the Dispensary Act and making no offer to restore the goods

The Court, after full hearing, committed him to custody until he restored the goods to the Receiver and until he paid the costs of the proceedings, and imprisoned him for three months as a punishment for his conduct. He has not paid the costs nor restored the goods. He is not now in jail, but at his usual avocation, though still in the custody of the marshal.

Petition for the writ of *habeas corpus* was presented to Mr. Justice Field on 21st September, 1893, in vacation, and a rule was issued by him on that day returnable before this Court.

POINTS OF LAW.

The petition for the writ and the argument of counsel in support of it, present for decision here a number of highly interesting questions, to only a few of which argument will be addressed in this brief.

For if the view taken herein of the scope of the writ of *habeas corpus* is correct, it is not probable that this Court will consider many of the questions raised by petitioner.

I.

THE SCOPE OF THE WRIT.

The object of the writ of *habeas corpus* as administered by this Court is not the correction of errors, but the release of the prisoner from confinement because he is held in custody without any lawful authority whatever for his detention.

However many or great may have been the errors below, however much this Court may differ in its judgment from the Circuit Court as to the extent of the punishment inflicted on the prisoner or as to the necessity for inflicting any punishment at all, this Court nevertheless cannot release him unless the Court below had no jurisdiction of the person or subject matter, or was without authority to grant any part of the judgment of committal under which he is held.

That mere errors cannot be considered on an application to this Court for the writ has often been decided by this Court in accordance with the law prevailing both in England and America.

> Church on Habeas Corpus, Sec. 317.
> Hurd on Habeas Corpus, Page 330.

In the late case of Tyler, Petitioner, 149 U. S., page 164 heard at the last term of this Court, on petition for the writ of *habeas corpus* on behalf of a prisoner, a sheriff of the State of South Carolina, who had levied tax executions upon property in the hands of the Court, and was committed by the same Court under whose order

the petitioner here is held, and in the same cause of *Bound vs. Railway Co.*, the following language is used by the Chief Justice:

"Unless the order of commitment was utterly void "for want of power, this application must be denied. "The writ of *habeas corpus* is not to be used to perform "the office of a writ of error or appeal; but when no "writ of error or appeal will lie, if a prisoner is imprisoned "under a judgment of the Circuit Court, which had no "jurisdiction of the person or of the subject matter, "or authority to render the judgment complained of, "then relief may be accorded." * * * *

"And even if the contention were well founded, "which is not at all to be conceded, that under the "fifth section of the Judiciary Act of March 3, 1891, "a writ of error might be brought to review such a "judgment as that before us, and that thereby our ap- "pellate jurisdiction was enlarged, we should still de- "cline to consider the whole record for error merely, but "only to ascertain whether the judgment was absolutely "void."

See also Harvey vs. Tyler, 2 Wall., 328; *Ex-parte* Lange 18, Wall; 163 *ex-parte* Parks 93 U. S., 18 *ex-parte* Seabold, 100 U. S. 371; *ex parte* Rowland, 104 U. S. 604; *ex-parte* Curtis, 106 U. S., 371; *ex-parte* Fisk, 113 U. S., 713.

In re Ayers 123 U. S., 443; *ex-parte* Terry, 128 U. S. 289, Neilson petitioner, 131 U. S., 176; Savin, petitioner, Ibid 267, Cuddy; Petitioner, Ibid, 280. In re Frederick 149, U.S. 70.

II.

PETITIONER'S OBJECTIONS.

Examining the case made by Petitioner in the light of these doctrines, it will be found that the only objections to the judgment of committal by the Court below, which can be considered, are:

First. That the Court was without jurisdiction to make the order of committal.

Second. That granting its jurisdiction to commit, it has exceeded its authority in imprisoning the Petitioner, and also making him pay the costs of the proceedings.

The first objection is stated as follows in the petition:

"That while it is true, as stated in the decree, that your Petitioner acted upon his own motion, and without instructions from any person, yet he did so act as such constable under the authority of his commission, and under the duty imposed upon him by the Dispensary Act itself to enforce it, and in the performance of such duty, to seize the said liquor while in transit." Petition, page 4.

The second objection is stated as follows in the argument of the Attorney General of South Carolina, who appears for the Petitioner:

"But if the Circuit Judge had jurisdiction and authority at all, to attach the Petitioner for contempt, he must be considered as having exceeded his authority in punishing him with both fine and imprisonment and payment of the costs," Argument, page 20.

III.

THE XI AMENDMENT.

The offence for which the Petitioner was punished, was seizing and taking away from the custody of the Court, goods which were in the possession of a Receiver, appointed in a suit in Equity, within the jurisdiction of the Court below.

The Petitioner justifies this trespass, on the ground that he was a State officer, charged with the duty of executing the valid laws of the State of South Carolina, and engaged in the execution of the said laws.

Although neither in the Petiition nor the argument of counsel supporting it, is direct reference made to the inhibition of the XI Amendment of the Constitution of the United States, yet this defence does practically set up the bar of that Amendment, which forbids suits against a State.

In other words, the defence is that the Petitioner being such State officer, is but the agent of the State, and that any proceeding against him while performing the functions of the State itself, is a suit against the State, and, therefore, forbidden by the XI Amendment to the Constitution of the United States.

In order to justify himself, it is manifest the Petitioner must produce the authority of a law of the State constituting him its agent, and directing him to commit the trespass for which he was attached, and the law itself must be a valid and Constitutional law.

In the case of In Re Ayers, 123 U. S., 443, Mr. Justice Matthews clearly lays down this law as follows:

"A defendant sued as a wrong doer, who seeks to sub-
"stitute the State in his place, or to justify by the authori-
"ty of the State, or to defend on the ground that the State
"has adopted his act and exonorated him, cannot rest on
"the bare assertion of his defence. He is bound to estab-
"lish it. The State is a political corporate body, can act
"only through agents, and can command only by law.
"It is necessary, therefore, for such a defendant in order
"to complete his defence to produce a law—a law of the
"State which constitutes his commission as its agent, and
"a warrant for his act. This the defendant in the pres-
"ent case undertook to do. The legislation under which
"the defendant justified being declared to be null and
"void as contrary to the Constitution of the United
"States, therefore left him defenceless, subject to answer
"to the consequences of his personal seizure and deten-
"tion of the plaintiff's property, and responsible for the
"damages occasioned thereby."

This doctrine is approved in the case of In Re Tyler 149 U. S. 164, cited above and numerous other cases.

Pennoyer vs. McConnaughy, 140 U. S. 1,
United States vs Lee, 106, U. S. 196.
New Hampshire vs. Louisiana, 108, U. S. 76.
Hans vs. Louisiana, 134, U. S. 1.
McGahey vs. Virginia, 135, U. S. 662.

The first step, therefore, in petitioners defence is to produce the statute authorizing his act, the second is to establish the validity of the law which he interposes as his shield. Until he has taken the first step all discussion as to the second is unnecessary and useless.

If, however, it be maintained by Petitioner that he does not claim exemption from arrest under the XI. Amendment, but under a claim of exemption of the Executive Department of the State Government, from inter-

ference by the Judicial Department of the United States, Petitioner would still be under the necessity of producing, for his protection, a valid law of the State, authorizing the act for which he was arrested; for under the facts of this case, it is a State Executive Officer who has committed a trespass, which he seeks to justify, upon property in the possession of the Judicial Department of the United States, and not an officer of the Judicial Department who is interfering by force with the Executive officers of the State.

Whether, therefore, Petitioner's defence is rested upon exemption from arrest under the XI. Amendment, or under the doctrine of the independence of the several departments of the Federal and State Governments, he must alike produce a valid law of the State, authorizing him to commit the act for which he has been imprisoned.

IV.

SEIZURE WITHOUT WARRANT.

It was admitted in the argument below as stated in the opinion of the Circuit Court (Petition, page 17,) that unless express authority was given petitioner by the Statute under which he professed to act, he could not have made a legal seizure without warrant.

This admission has not been made in the argument here, but no authority whatever has been produced. and it is submitted no authority can be produced, either in England or in any of the Federal or State Courts, justifying a seizure of intoxicating liquors without warrant, except under authority of a Statute expressly authorizing the officer to make such seizure.

The law is indeed all the other way.

"Unless authorized by Statute an officer cannot justify entering "a building and seizing intoxicating liquors and the vessels con- "taining the same, which were illegally kept by the owner thereof "unless he had and acted under a warrant."

Black on Intoxicating Liquors, Section 363.

The ruling of Chief Justice Shaw in the case of Kennedy vs. Favor, 14 Gray, 200, is as follows:

"The authority to seize liquors without a warrant though sometimes necessary, is a high power, and being

in derogation of common law right, it is to be exercised only where it is clearly authorized by the Statute or rule of law which warrants it."

The same doctrine is laid down in Maine.

"The power given by the statute to an officer to seize property at pleasure without a warrant is an extraordinary one, and can only be justified on the ground that the public good and the interest of society require it, the Statute should be construed strictly."

Weston vs. Carr, 71 Maine, 356.

In only three States of the Union is authority given by Statute to seize intoxicating liquors without warrant, in Massachusetts, Maine and Vermont, and in two of them, as has been shown, the Courts have declared against the right to seize except under the direct authority of the Statute law.

But it is contended for petitioner that seizure without warrant is authorized by the Statute of South Carolina, commonly called the "Dispensary Act," approved December 24th, 1892, 20 Statutes at Large, page 72. It is not contended that this power is given in express terms. It is, however, maintained that it is given by implication. An examination of the Statute will show what foundation there is for this contention.

A copy of this Act is annexed to the petition, and marked Exhibit C.

This Statute nowhere forbids the manufacture or use or purchase of intoxicating liquors for private use, nor for except for purposes of sale, exchange, barter, or for the purpose of dispensing the same. It does, however, prohibit such sale and dispensingof intoxicating liquors except by certain State officers, known as "County Dispensers."

The Act is in no sense of the word what is commonly known as a "Prohibition Act." It is well said by the Court below, (Return 18).

That "it must be borne in mind that from the whole "tenor of this Act the use of intoxicating liquors as a "beverage by the mass of the community is recognized,

"and its use for this purpose is not discouraged. The "sale of it is conducted openly and in public places. The "whole purport, meaning, intent, of the Act is to place "such sale in the hands of certain persons recognized and "appointed by the highest functionaries in the State, and "to bring it within reach of the people."

In order to carry out the purpose of placing the whole traffic in intoxicating liquors in the hands of the State, the Act contains the following provisions:

Section 22 of the Act, reads as follows:

"All places where intoxicating liquors are sold, bartered or "given away in violation of this Act, or where persons are "permitted to resort for the purpose of drinking intoxicating "liquors as a beverage, or where intoxicating liquors are "kept for sale, barter or delivery in violation of this Act. are "hereby declared to be common nuisances, and if the existence "of such nuisance be established either in a criminal or equi-"table action upon the judgment of a Court or Judge having "jurisdiction, finding such place to be a nuisance, the Sheriff, his "deputy, or any constable of the proper County or city where the "same is located, shall be directed to shut up and abate such place "by taking possession thereof, if he has not already done so, and "by taking possession of all such intoxicating liquors found therein, "together with all signs, screens, bars, bottles, glasses and other "property used in keeping and maintaining such nuisance, and "such personal property, so taken possession of shall, after judg-"ment against said defendant, be forthwith confiscated to the State." * * * *

Section 23 is as follows:

"The Attorney-General, his assistant, the Circuit Solicitor or any "citizen of the county where such nuisance exists or is kept or "maintained may mantain an action in the name of the State to "abate and perpetually enjoin the same. The injunction shall be "granted at the commencement of the action in the usual manner of "granting injunctions except that the affidavit or complaint or both "may be made by the Attorney-General, his assistant, or the Solici-"tor of the Circuit upon information or belief, and if an affidavit "shall be presented to the Court or Judge stating or showing that in-"toxicating liquors particularly describing the same are kept for "sale, or are sold, bartered, or given away on the premises, particu-"larly describing the same where such nuisance is located "contrary to law the Court or Judge shall at the time of granting "the injunction issue his orders commanding the officer serving "the writ of injunction at the time of such service diligently to "search the premises and carefully to invoice all the articles "found therein, used in or about the carrying on of the un-"lawful business for which search and invoicing said officer shall re-"ceive the fees now allowed by law for serving an injunction. If such "officer upon such search shall find upon such premises any intoxi-

"cating liquor or liquors of any kind in quantity going to show it "was for purposes of sale or barter he shall take the same into his "custody and turn over the same to the Sheriff of the County who "shall securely hold the same to abide the final judgment of the "Court in the action (the expense for holding to be taxed as part of "the cost of the action) and such officer shall also take possession of "all personal property found on such premises and turn over the "same to the sheriff of the county who shall hold the same until the "final judgment be paid. The finding of such intoxicating liquors "on such premises with satisfactory evidence that the same was being "disposed of contrary to this act shall be *prima facie* evidence of "the nuisance complained of * * * Any person violating "the terms of any injunction granted in such proceedings shall be "punished for contempt." * * *

Section 25 is as follows:

"No person shall knowingly bring into this State or knowingly "transport from place to place within this State by wagon, cart or "other vehicle or by any other means or mode of carriage any intox- "icating liquors with the intent to sell the same in this State in vio- "lation of law or with intent that the same shall be sold by any "other person or to aid any other person in such sale under a "penalty of five hundred dollars and costs for each offence, "and in addition thereto shall be imprisoned in the county "jail for one year * * * Any servant, agent or em- "ployee of any railroad corporation or any express com- "pany or of any persons, corporations or associations doing "business in this State as common carriers, who shall remove "any intoxicating liquors from any railroad car, vessel or other "vehicle of transportation at any place other than the usual and es- "tablished stations, wharves, depots, or places of business of such "common carriers within some incorporated city or town where there "is a Dispensary or who shall aid in or consent to such removal shall "be subject to a penalty of fifty dollars and imprisonment for thirty "days for every such offence provided said penalty shall not apply "to any liquor in transit when changed from car to car to facilitate "transportation. *All such liquors intended for unlawful sale in "this State, may be seized in transit and proceeded against as if "it were unlawfully kept, and deposited in any place,* and any "steamboat, sailing vessel, railroad or express company or other "corporations knowingly transporting or bringing such liquors into "the State shall be punished upon conviction by a fine of five hun- "dred dollars and costs for each offence knowledge on the part of "any authorized agent of such company shall be deemed knowl- "edge of the company." * * *

It will be seen from the above quotations. that the only provisions for seizing intoxicating liquors in transit are contained in the clause from the 25th Section of the Act printed above in italics namely: "All such liquor in- "tended for unlawful sale in this State may be seized in "transit and proceeded against as if it were unlawfully "kept, and deposited in any place."

Now what are the provisions of the Act with regard to

"seizing and proceeding against" liquors "unlawfully kept" and deposited "in any place?"

These provisions will be found in Section 22 quoted above:

"All places * * * where intoxicating liquors are kept "for sale, barter or delivery in violation of this Act are hereby de- "clared to be common nuisances, and if the existence of such nui- "sance be established either in a criminal or equitable action upon "the judgment of the Court or Judge having jurisdiction, finding "such place to be a nuisance the sheriff or any constable of the "proper county shall be directed to shut up and abate such place by "taking possession thereof * * * and by taking possession "of all such intoxicating liquors."

In the Equitable proceedings provided for by the 23d Section above quoted for injoining "perpetually" the maintenance of any place where liquors are unlawfully kept, careful provision is made that the order for seizure of the goods shall only be issued upon an affidavit "Stating or showing that intoxicating liquors par- "ticularly describing the same are kept for sale or are "sold, bartered or given away on the premises particu- "larly describing the same where such nuisance is lo- "cated."

The officer is required to "carefully invoice" all the articles found therein. It is further provided that "if such "officer upon such search shall find upon such premises "any intoxicating liquor or liquors or any kind in "quantity going to show it was for purpose of sale or bar- "ter he shall take the same into his custody and turn the "same over to the sheriff of the county."

The contention of Petitioner's counsel seems to be, (Argument, page 15,) that because the requirements of the 25th Section, as to the seizing in transit, do not repeat the very careful provisions of the 22nd and 23rd Sections, as to seizures in places where liquor is illegally kept, it was, therefore, the intention of the Legislature not to require any preliminary precautions or judicial action with regard to liquor seized in transit.

It is submitted on the contrary, that these provisions were omitted, because when the Statute provided that liquors in transit should be "seized and proceeded against as if unlawfully kept and deposited in any place," all of

these carefully devised precautions were adopted as fully by these phrases of the Statute, as though they had been specifically set out.

Indeed, the action of the Petitioner himself, shows that he recognized that the provisions of Section 23 applied to seizures in transit, for he made return in response to the rule against him, issued by the Court below, that he had "turned the goods seized over to the Sheriff of Charleston County, who now holds said whiskey, subject to the provisions of the law, as to contraband whiskey." (Return, page 12,) and only under the provisions of that Section, are intoxicating liquors, when seized, directed to be " turned over the Sheriff of the County."

These Sections, 22 and 23, also contain the only provisions for forfeiting the goods to the State.

Under what principle of construction is it permitted to Petitioner, to omit from the clause of the Act authorizing the seizure of property of the citizen in transit, requirements so important as the affidavit which supports a warrant, and the warrant itself as well as the particular description of the goods to be seized, and the place where they are kept, and yet to retain the rest of the provisions for confiscating the property ?

In the argument for Petitioner, it is further contended that the intention of the Legislature to authorize the seizure of intoxicating liquor in transit, may be presumed from the fact that goods in transit, are more difficult to identify and detain, than goods deposited or kept in any place for unlawful sale. (Argument. page 15.) It is almost needless to say or to quote authority to show, how subversive such a presumption would be of all the canons for construing penal Statutes, creating new offences unknown to the Common Law, and confiscating to the State, property not hitherto contraband.

The cases cited above, from Maine and Massachusetts (Weston vs. Carr, 71 Maine, 356, Kennedy vs. Favor, 14 Gray, 200,) States in which the Courts have certainly shown no inclination to favor the traffic in intoxicating liquors are strong in maintaining a strict construction of the laws regulating their use.

But we are not left to State Courts for an emphatic declaration of the true doctrine for the construction of laws restricting the sale of intoxicating liquors.

In the case of Northern Pacific Railroad vs. Whalen, 149 U. S., 157, decided at the last term of this Court, where an injunction was sought by a Railroad corporation against the keepers of saloons near the line of its road as for a nuisance, under the general principals of equity jurisprudence and the provisions of the code of Washington Territory—this Court,—Mr. Justice Gray delivering the opinion—in denying the injunction uses these words:

"But this section creating a new liability unknown to "the common law is to be strictly construed and is not to "be extended beyond the clear import of its terms."

Nor is the Dispensary Act silent as to the duties of constables appointed under its provisions.

The appointment of these constables is provided for in Section 26.

"The Governor shall have authority to appoint one or "more State constables at a salary of two dollars per day "and expenses when on duty, to see that this Act is en- "forced, the same to be charged to the expense account of "the State Commissioner."

His duties are declared in Section 24: "It shall be the "duty of the sheriffs, deputy sheriffs and constables having "notice of the violation of any of the provisions of this "Act to notify the Circuit Solicitor of the fact of such "violation and to furnish him the names of any witnesses "within their knowledge by whom such violation can be "proven."

The only other mention of constables in the Act is in Section 22, where the following words are used, "and if "the existence of such nuisance be established either in a "criminal or equitable action upon the judgment of a "Court or Judge having jurisdiction, finding such place to "be a nuisance, the sheriff, his deputy or any constable of "the proper county or city where the same is located shall

"be directed to shut up and abate such place by taking "possession thereof."

The admission of the constable himself, the petitioner here, is that he acted, "upon his own motion and without instructions from any person." (Petition page 4.)

In so doing he has violated the express provisions of the Act and has put himself beyond its protection.

When the Act in terms pointed out his duty to notify the Solicitor of any violation of the law, and to abate nuisances after they were judicially adjudged to exist, under the familiar rule that the *expressio unius est exclusio alterius*, it forbid him to seize property of his own motion and without judicial action.

In the case of Reed vs. Adams, Second Allen, 413, this rule is well expressed in a case, arising under the Statutes of Massachusetts, authorizing the seizure of intoxicating liquors without warrant.

"It cannot be supposed," says the Court, "in the ab- "sence of any express or implied permission, that the "Legislature intended to authorize civil officers in all "places and under all circumstances to search for and "seize intoxicating liquors kept for the purpose of illegal "sale, it certainly has not done so, but, on the contrary, "has named the particular instances as when it is illegally "sold, transported or distributed, or kept and sold in "shanties near grounds, and on public occasions that "liquor may be seized by an officer and taken away from "its owner without a warrant. And this enumeration of "particular instances, according to a well settled rule of "construction, necessarily excludes all others, but when "it is considered that immunity from all unreasonable "searches and seizures, both of the person and property "of the citizen, is a constitutional right, and that intoxi- "cating liquors, though liable in their misuse to cause the "most mischievous effects, are still to be regarded as "property, as they are in very many of the provisions of "this Statute, and when the Legislature has specified with "precision particular cases in which seizures of such prop- "erty may be made without a warrant, the indemnity

" provided in Section 38 cannot, without giving undue and " unwarranted force to the general terms in which it is " expressed, be construed as extending to other cases in " respect to which no authority has been conferred or per- " mission given."

V.

THE CONSTITUTION OF SOUTH CAROLINA:

But the Circuit Judge also decided that even if the Statute had authorized the seizure of the goods without warrant, it would have been unconstitutional inasmuch as it was in violation of Article I, Section 22, of the Constitution of South Carolina, which makes the following declaration of rights:

" All persons have a right to be secure from unreasonble " searches or seizures of their persons, houses, papers or " possessions. All warrants shall be supported by oath or " affirmation, and the order of a warrant to a civil officer " to make search or seizure in suspected places, or to " arrest one or more suspected persons, or to seize their " property, shall be accompanied by a special designation " of the persons, and the object of the search, arrest or " seizure. And no warrant shall be issued but in the cases " and with the formalities prescribed by the laws."

This declaration is almost identical with the IV Amendment to the Constitution of the United States, and substantially the same provisions against searches and seizures without warrant are found in the Constitutions of all the States of the Union except New York.

Stimson's American Statute Law, Section 71.

They are the embodiment in the fundamental law of the country, of the celebrated judgment of Lord Camden, in the case of Entick vs. Carrington, (19 Howel's State Trials, 1029.) against the legality of general warrants issued by a Secretary of State, under authority of which the house of printer of the celebrated John Wilkes was searched and his papers seized.

Boyd vs. the United States, 116 U. S., 616.

Cooley's Constitutional Limitation, 5th Edition, 368.

The declaration in the Constitution of South Carolina against unreasonable search and seizure is perhaps more particular and emphatic than in any of the States, and very naturally so, for in the contest between John Wilkes and the Crown, the Colony of South Carolina took a deep interest, appropriating a considerable sum towards maintaining Wilkes in his struggle, and involving the Colony in disputes with the Home Government, which were only terminated at the final separation from the mother country.

It is true, that under decisions of the Courts of Maine, Massachusetts and Vermont it has been decided that statutes authorizing the seizure of intoxicating liquors without warrant are not forbidden by the Constitutions of those States, which contain provisions similar in the main to the provisions of the Constitutions of South Carolina.

Jones vs. Root, 6 Massachusetts, 435 ; *In re* Powers, 25 Vt., 261 ; State vs. McCann, 59, Maine, 383.

But the statutes of all these States have careful provisions for the immediate issuance of a warrant after the goods have been seized with the same formalities as are required in cases where the warrant is issued before seizure, and it has been decided in all of these States that unless these steps for securing a warrant are strictly complied with by the officer making the seizure, he becomes a trespasser *ab initio* and may be mulct in damages therefor.

In re Liquors of Hoxie, 15 Rhode Island, 241.
Weston vs. Carr, 71 Maine, 356.
Kent vs. Wiley, 11 Gray, 368.

Say the Court, in the case of Weston vs. Carr, 71 Maine, 356, with regard to what is a reasonable time : " Where no " sufficient reason is given for a longer delay, we think it " should not exceed twenty-four hours from the time of " seizure."

The Courts of the three States above named may have been justified under their special usages and practice in deciding their carefully framed laws not to be unconstitutional, and the seizures under them not to be unreasonable. The South Carolina Statute, even in case petitioner's contention were sustained, and the statute construed to authorize the seizure without warrant, contains no provi-

sion for the taking out of a warrant subsequent to the seizure, nor any provision by which the owner was to be notified of the seizure. The absence of this last provision alone would render the seizure unreasonable.

Hibbard vs. People, 4 Mich.. 125.

Under the construction placed by the petitioner upon the Statute, he considered himself permitted to hold the goods seized for seven days, without taking a single step toward procuring a warrant, and without taking any proceedings whatever to confiscate the goods, and in the mean time the Receiver, who was responsible for the goods, not only did not know what had become of them, but as there was no public record of the seizure, could only have ascertained the facts from such information as it may have pleased the Constable to extend. It is submitted, that such a construction would elevate the discretion of a subordinate officer above that confided to Superior Courts.

VI.

CUSTODY OF THE LAW.

But granting that the petitioner was authorized by the Statute to seize intoxicating liquors without warrant, and that he has pursued the formalities required by the Statute, had he authority to take the goods from the custody of the Receiver without the permission of the Court of which the Receiver was the hand?

The case has been considered so far as though such seizure would not have been a contempt of Court, and it is true that the Circuit Court did not rest its decision upon the ground that the constable had no right to interfere with the property in its custody even supposing the State Statute and Constitution had authorized a seizure without warrant.

While no decision has been found in any of the Courts of the State or United States directly bearing upon the question as to how far the custody of the Court over property in its charge may be interfered with under the criminal process of a State, there would seem to be no essential difference in principle between the seizure of such property whether under the civil or criminal law.

In the case of In Re Tyler, 149 U. S. 164, already cited,

this Court decided that property in the possession of a Receiver by virtue of his appointment by a Circuit Court of the United States, is not subject to seizure under a tax execution issued for the collection of taxes due to the State, and that an attempt to make such levy may be punished as for contempt.

The doctrine is thus declared by the Chief Justice in that case:

"The general doctrine that property in the possession " of a Receiver appointed by a Court is *in custodia legis*, " and that unauthorized interference with such possession " is punishable as for contempt, is conceded; but it is con- " tended that this salutory rule has no application to the " collection of taxes. Undoubtedly property so situated " is not thereby rendered exempt from the imposition of " taxes by the government within whose jurisdiction the " property is, and the lien for taxes is superior to all other " liens whatsoever, except judicial costs, when the property " is rightfully in the custody of the law, but this does not " justify a physical invasion of such custody and a wanton " disregard of the orders of the Court in respect of it. " The maintenance of the system of checks and balances " characteristic of Republican institutions requires the co- " ordinate departments of government, whether Federal or " State, to refrain from any infringement of the indepen- " dence of each other, and the possession of property by " the judicial department cannot be arbitrarily encroached " upon, save in violation of this fundamental principle."

The Circuit Court of the United States would not, try the question as to whether the goods were forfeited to the State as between the State and her citizens, but it is difficult to perceive why a petty officer should be permitted without warrant and without permission of the Court appointing the Receiver to take property from the possession of the Court when a sheriff holding a tax execution, or the process of a Civil Court would not be permitted to interfere with the Receiver's custody.

The goods while in the custody of the Court are in no danger of being lost. The Receiver who is the officer of the Court and the Court itself, may always be approached for the purpose of detaining the goods, and no good reason can be advanced why permission of the Court should not

be first obtained before seizure. It is not for an instant to be supposed that the Court would permit its officer to disobey the valid police laws of the State, and if the laws be invalid the proper occasion for declaring them so is surely before the Court has lost possession of the goods.

The object of civil process and criminal process is the same, to sequestrate the property to answer the exigencies of the writ or warrant. Property in the hands of a Receiver is already sequestrated under an equitable execution and held to answer all further demands against it.

In Re Tyler, 149 U. S., 164.

What necessity is there then for a second sequestration, and further process, when a mere intimation to the Court will detain the property until every question concerning it may be litigated either in the Court having possession of the *res* or in such jurisdiction as the Court having possession may direct?

Evidence of the fact that Receivers appointed by the United States Courts, are not in the habit of violating the criminal laws of the States in which the property under their charge is situated, may be found in the almost entire absence of cases in the Federal Courts, where an attempt has been made to interfere with the person of a Receiver or the property under his charge under the criminal laws of the States.

The case of the United States vs. Murphy, 44 Federal Reporter, 39, is the only case which has been reported.

There, certain town ordinances granted a Steam Motor Company the right to construct and operate its road through the streets of the town of Colton, in the Southern District of California. In an action to foreclose a mortgage of the road, a Receiver was appointed by the Circuit Court, and ordered to operate the road. Under complaint of a private citizen, the Receiver was arrested by a constable, acting under a warrant from a Justice of the Peace, on the ground that the ordinances permitting the running of the road through the streets were void, and the Receiver, in operating the road, was, under the Code of California, committing a nuisance. Judge Ross

sitting in the Circuit Court for that District, held, that even if the ordinances were void, the respondent, Murphy, had committed a contempt of Court, in causing the arrest of the Receiver, and he was accordingly fined by the Court.

The Court, in the course of its opinion, discusses the relation of a Receiver toward and the Criminal Laws of the States, in these words:

"It is undoubtedly true, that the position of Receiver " of a Federal Court does not afford such officer immu- " nity from arrest, for a violation of the ordinary Crimi- " nal Statutes of a State, but the question here is, whether " the Court that has in an action over which its jurisdic- " tion is unquestioned, and beyond question, taken into " its possession the property involved in it, and appointed " a Receiver to manage and operate the property for the " benefit of the parties in interest will permit, its officer, " who is but the hand of the Court, to be arrested or " otherwise interfered with in the discharge of his duties " under the order of the Court. It seems to me, " there can be but one reasonable answer to this, and " that in the negative. Every Court should take a sensi- " ble view of matters before it. Because a Receiver of a " Court would not be exempt from arrest for murder or " grand larceny, or any other crime committed outside " and independent of his duties as such officer, it by no " means follows that immunity from arrest will not ex- " tend to him for acts done in discharge of the duties " imposed upon him by the order of the Court having " jurisdiction in the premises * * * * * * * The " conduct of the Receiver is always subject to the con- " trol of the Court appointing him, and in any case where " the Receiver, in the exercise of the powers conferred " upon him, interferes with the rights of any third per- " son, it is to be presumed that an appropriate applica- " tion to the Court having control of him, will remedy " the wrong." * * * * * *

Petitioner, however, contends that the Act of March 3, 1887, 24 U. S. Statutes at Large, page 554, which requires the Receiver of a Railway Company, to manage and operate the property under his charge, according to the requirements of the valid laws of the State,

where the property is situated, has the effeet of rendering the property under his charge, subject to seizure under the Police Laws of the State.

This Court, in the case of In Re. Tyler, 149 U. S., 164 so often quoted in this Brief, had occasion to consider the effect of this Act of Congress upon the power of the Circuit Courts of the United States, to preserve property in their custody.

The language of the Court is as follows:

"Ordinarily the Court will not allow its Receiver to be "sued, touching the property in his charge, nor for any "malfeasance of the parties or others, without its con- "sent, and while the third Section of the Act of Congress "of March 3rd, 1887, 24 Statutes, 552, chapter 373 now "permits a Receiver to be sued without leave, it also pro- "vides that such suit 'shall be subject to the general "equity jurisdiction of the Court in which such Receiver "or Manager was appointed, so far as the same shall be "necessary to the ends of justice.' Neither that nor the "second Section, which provides that the Receiver 'shall "manage the property according to the valid laws of the "State in which such property shall be situated,' restricts "the power of the Circuit Courts to preserve property in "the custody of the law, from external attack."

The petitioner under this declaration of the law, it is submitted, can find no authority in the Act of 1887 for his unwarranted intrusion upon the possession of the Receiver.

VII.

THE PUNISHMENT OF PETITIONER.

It is contended in argument—though the petition for the writ does not set up this as a ground for his discharge—that the Court has exceeded its power in sentencing the prisoner not only to imprisonment but to the payment of the costs of the proceedings which it is insisted are in the nature of a fine.

" tion of the prisoner after he has served out the full term " of imprisonment which the Statute empowered the Court " to impose upon him, and he is then entitled to his " discharge on *habeas corpus*. If the Court in this case," a committal for contempt of Court, "had committed the " prisoner for the full term of six months allowed by the " Statute, and had superadded to that a further commit- " ment for six years, and the prisoner after having paid " his fine and served his six months imprisonment, had " applied to be discharged on *habeas corpus*, the case of " People vs. Liscomb, might with propriety have been cited " as an authority in support of his application."

VIII.

THE DISPENSARY LAW.

The case has been discussed without any reference to the constitutionality of this Act, or to the constitutionality of those provisions which forbid the transportation into the State by railroad corporations of intoxicating liquors.

These highly important questions, it is understood, will come up for decision by this Court in cases now upon its docket to be heard at this term.

If the objections to the issuing of the writ made in this brief are well taken, there can be no necessity for further discussion as to the constitutionality of the law and its bearing upon Inter-State commerce. The petitioner, it is submitted, has not by his conduct as disclosed in the record commended himself sufficiently to the Court to warrant unnecessary trespass upon its patience and time.

JOSEPH W. BARNWELL,
Counsel for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. ———Original.

EX PARTE—IN THE MATTER OF C. B. SWAN, PETITIONER.

To the Honorable the Chief Justice and Associate Justices of the said Court :

George I. Cunningham, United States Marshal for the District of South Carolina, upon whom has been served an order issued by Mr. Associate Justice Field in vacation, on the twenty-first of September, 1893, to show cause before this Court why a writ of *Habeas Corpus* should not issue as prayed for in the petition of C. B. Swan, served with said order, for return thereto, answering says:

That it is true that the said C. B. Swan is restrained of his liberty by this respondent: but this respondent says that the said C. B. Swan is so restrained by virtue of the order of the Circuit Court of the United States for the District of South Carolina, bearing date the 31st day of August, 1893, made in the case of F. W. Bound vs. the South Carolina Railway, *et al.*, set out in said petition, a copy of which order is hereto annexed as a part of this return and marked Exhibit "A," and this respondent further says, that said C. B. Swan has never returned the property mentioned in said order to the custody of the Receiver therein mentioned, nor paid the costs of the said proceedings adjudged against him.

And this respondent further answering, says that said C. B. Swan is not now in the jail in Charleston, in the State of South Carolina, as alleged in said petition, but is at his home in the county of Charleston, in said State, though still in the custody of this respondent.

And this respondent, inasmuch as the said petition does not set out a record of all the proceedings in the said Circuit Court in which said order was issued, further annexes hereto as a part of this return and marked Exhibit "B," a copy of the order to show cause issued by the said Circuit Court and served upon said petitioner, C. B. Swan, thus completing said record.

And this respondent submits that no sufficient showing having been made by the said C. B. Swan that he is illegally held and confined in the custody of respondent, but on the contrary this respondent having shown that such confinement and custody is under the order and judgment of a Court having competent jurisdiction and authority to make the same, prays the judgment of this Court, that the rule herein entered against him be discharged and the prayer of the petition be denied.

JOSEPH W. BARNWELL,
Attorney for Respondent.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.

George I. Cunningham being duly sworn, says that he is the respondent named in the foregoing return; that he has read the same and knows the contents thereof, and that the statements therein are true as he verily believes.

GEORGE I. CUNNINGHAM.

Sworn to before me this 3rd day of November, 1893.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

EXHIBIT "A."

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT.

IN RE F. W. BOUND,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY, ET AL.

EX PARTE D. H. CHAMBERLAIN, RECEIVER OF THE SOUTH CAROLINA RAILWAY COMPANY.

vs.

C. B. SWAN.

It is ordered, that the rule be made absolute, and that the respondent C. B. Swan be adjudged guilty of a contempt of this Court.

It is further ordered, that the Marshal of this District take him in custody, and that he be imprisoned in the jail of Charleston County until he returns to the custody of the Receiver, the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered that he suffer a further imprisonment thereafter in said county jail for three months and until he pay the costs of these proceedings.

CHARLES H. SIMONTON,
U. S. Judge.

31st August, 1893.

I, J. E. Hagood, Clerk of the said Court, do hereby certify, that the foregoing opinion and order is a true copy of the original, now on file in this office.

Given under my hand and seal of said Court, at Charleston, S. C., this 3d day of November, 1893.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

EXHIBIT "B."

THE UNITED STATES OF AMERICA, } *Fourth*
DISTRICT OF SOUTH CAROLINA. } *Circuit.*
In the Circuit Court. } *In Equity.*

IN RE. F. W. BOUND.

vs.

THE SOUTH CAROLINA RAILWAY COMPANY, ET AL.

EX PARTE D. H. CHAMBERLAIN, RECEIVER OF THE SOUTH CAROLINA RAILWAY COMPANY.

It appearing by the petition that certain personal property alleged to be in the custody of this Court, and in the hands and under the control of its Receiver, duly appointed, has been seized by C. B. Swan, without lawful authority.

Upon filing the foregoing petition, and on motion of Joseph W. Barnwell, petitioner's solicitor, it is

ORDERED, That an order do forthwith issue and be served upon said C. B. Swan, requiring him to show cause before me, on the 17th day of August, 1893, at 11 o'clock A. M., at the United States Court House, Greenville, S. C., why he should not be attached and punished as prayed for.

2. That the said C. B. Swan do likewise show cause before me at the same time and place, why he should not be enjoined and restrained from interfering with any or all

of the property of the said South Carolina Railway Company, or other property in the possession and control of the said D. H. Chamberlain, as Receiver and officer of this Court, mentioned in the petition, or from interfering in any manner whatsoever with the officers and agents of the said Receiver, and also in any manner whatsoever, attempting to dispose of the said property, and why he should not be ordered to restore the same to the possession of said Receiver. That the said C. B. Swan do likewise, in due course, file an answer, if any he can, to the said petition, showing cause, if any, why such further relief as may be necessary, should not be granted in the premises.

3. In the meantime, it is ORDERED, that the said C. B. Swan be, and he is hereby, restrained and enjoined from selling, or in any manner whatsoever endeavoring to interfere with, or to dispose of the said property, mentioned in the petition, until the hearing of the rule and the order of this Court thereon.

4. That a copy of the petition and order herein, be forthwith served upon the said C. B. Swan.

CHARLES H. SIMONTON,
U. S. Judge.

In open Court this 17th day of August, 1893.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.
Fourth Circuit.
} *In the Circuit Court.*

I, J. E. Hagood, Clerk of the said Court, do hereby certify, that the foregoing order is a true copy of the original now on file in my office.

Given under my hand and seal of said Court, at Clerk's office, in the City of Charleston, S. C., this the 3d day of November, 1893.

J. E. HAGOOD,
C. C. C. U. S., Dis't S. C.

In the Supreme Court of the United States.

Ex parte

FRIEDRICH HOHORST,

Petitioner.

The above named petitioner, FRIEDRICH HOHORST, moves the Honorables, the Judges of the Supreme Court of the United States for a Rule on the Judges of the Circuit Court of the United States for the Southern District of New York, to show cause why a writ of mandamus should not be issued, commanding them to take jurisdiction and proceed against the Hamburg-American Packet Company, in the suit now pending and undetermined in the said Circuit Court of the United States for the Southern District of New York, wherein Friedrich Hohorst, the petitioner, is complainant, and the Hamburg-American Packet Company and others are defendants, and to strike from the record the order made in said suit, bearing date April 11, 1889, whereby the general appearance of said defendant corporation was amended to a special appearance, and whereby the service of subpœna *ad respondendum* upon said defendant corporation was set aside and quashed, and whereby said bill of complaint was dismissed, and commanding said Judges thereupon to make such disposition of said suit as ought to have been made had the said order not been made and entered therein, and why said petitioner should not have such other and further relief, or both, in the premises as may be just.

Washington, D. C., May 1, 1893.

Charles W. Fenno, *Of Counsel.*

To the Judges of the Supreme Court of the United States:

The petition of FRIEDRICH HOHORST respectfully shows:

1. That on or about the fifteenth day of September, 1888, a suit was commenced by your petitioner in the Circuit Court of the United States for the Southern District of New York, against the Hamburg-American Packet Company, Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester, for an infringement of certain letters patent of the United States belonging to your petitioner, by the issue of a subpœna and the filling of an original bill against said defendants.

2. That on or about September 17, 1888, at the City of New York, in the State of New York, the said subpœna was served upon the said defendant, Henry R. Kunhardt, Sr., and also upon the Hamburg American Packet Company, by exhibiting to the said Henry R. Kunhardt, Sr., general agent for said Company, the original thereof, and at the same time leaving with him a copy thereof. Said service was made by M. T. McMahon, United States Marshal for the Southern District of New York, per John E. Dowley, Deputy.

3. That at the time of the institution of said suit your petitioner was, and still is, a citizen of the State of New York and a resident and inhabitant of the City of Brooklyn, in said State of New York; and during like times the Hamburg-American Packet Company was, and still is, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the City of New York, and that the defendants, Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., and George H. Diehl, were, and still are, citizens of the State of New York, and the defendants, Arend Behrens and William Koester, were, and still are, citizens of the State of New Jersey.

4. That thereafter, and on or about November 5, 1888, all of said defendants filed in said court a general appearance in said cause.

5. That thereafter the defendant, The Hamburg-American Packet Company, by Kunhardt & Co., agents, filed, on or about December 18, 1888, their demurrer to said bill of complaint. Said demurrer was sworn to by the defendant, Arend Behrens, who stated that he was an agent of the said Hamburg-American Packet Company, and who further stated that said Company was organized under the laws of the Kingdom of Hanover, Empire of Germany.

6. That thereafter, the complainant in said suit made a motion to said court for leave to amend the bill of complaint, so as to show a joint liability of the defendants, and for leave to amend said bill by inserting therein the following allegagation,an allegation which your petitioner how here avers to be true: "Your orator further states that all of the defendants above named are inhabitants of the City and County of New York. That the defendant, The Hamburg-American Packet Company, has its principal business office in this country, located in the City and County of New York. That the defendants, Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester are, and during the time of the infringement above set forth were, copartners, under the firm name of Kunhardt & Company, and as such copartners are, and were, the agents and managers of the business of the Hamburg American Packet Company in this country, and have their principal business office, as such, located in the City and County of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all the said acts and infringements."

7. That in opposition to said motion an affidavit was filed, made by the defendant, Arend Behrens, in which affidavit he stated as follows: "Said Company" (meaning the Hamburg-American Packet Company) "advertises that it has an office in the City of New York. It is, in fact, the office of Kundardt & Co., agents for the Hamburg-American Packet Company, and in said office of Kunhardt & Co., and by Kunhardt & Co., as agents, the usual monetary and financial transactions of said Hamburg-American Packet Company are conducted."

8. That Henry R. Kunhardt, Sr., upon whom service was made of the subpœna in said suit, as before stated, at said times, was a member of said firm of Kunhardt & Co., and was one of the agents of the said defendant corporation as aforesaid.

9. That thereafter, upon hearing said motion, an order was made in said court granting leave to the complainant therein to amend his bill of complaint, as prayed for, *nunc pro tunc*. The said order was filed in said court January 31, 1889.

10. That thereafter, and on or about February 2, 1889, an amended bill of complaint was filed in said court, containing the amendments theretofore allowed by said court, pursuant to said order.

11. That thereafter, a motion was made to said court, on behalf of the defendant, The Hamburg-American Packet Company, for an order directing that the notice of appearance entered in the said cause on behalf of the defendant, The Hamburg-American Packet Company, be amended, *nunc pro tunc*, by inserting in said notice the following words, to wit, "And you will please take notice that the said appearance of the defendant, The Hamburg-American Packet Company herein, is not made generally, but specifically, and for the specific and only purpose of moving to set aside the alleged service of the subpœna *ad respondendum* upon it through its alleged agent, Henry R. Kunhardt, Sr., and to dismiss the bill of complaint herein as against it, because of lack of jurisdiction, and for the purpose of procuring the dismissal of said bill, as against it for lack of jurisdiction, by motion, demurrer, bill or plea, as it shall be advised," and for an order directing that the service of the subpœna *ad respondendum*, made upon said defendant corporation, be set aside and the bill of complaint dismissed as against corporation, because of lack of jurisdiction of said court over the person of said defendant corporation, and for such other and further relief as to the Court should seem meet."

12. Said motion was resisted and an affidavit filed in opposition thereto, verified by Salter S. Clark on March 14, 1889, he being one of the complainant's solicitors, in which affidavit it appeared that on September 5, 1888, the original bill was filed and subpœnas issued, and that a subpœna had been served upon Henry R. Kunhardt, Sr., as agent for the said defendant corporation; that on November 5, 1888, all of the six defendants, including said defendant corporation, appeared voluntarily and generally; that on November 27, 1888, the said Salter S. Clark extended the defendants' time to answer or plead to December 20, 1888; that on December 18, 1888, separate demurrers were filed by each defendant; that on December 24, 1888, notice of motion was served by complainant to amend his bill so as to show that the infringement of the patent was joint on the part of the defendants; that on January 7, 1889, notice of motion was served on behalf of defendants to dismiss the bill; that on January 28, 1889, complainant's motion to amend was granted, and defendants' motion to dismiss was denied; that on February 2, 1889, the amended bill of complaint was filed; that on February 16, 1889, notice of hearing was served by the defendant, The Hamburg-American Packet Company, upon (as stated in said notice of argument) "the bill of complaint, de-

murrer, pleadings and other proceedings;" and that on February 23, 1889, the notice of motion was received on behalf of the defendant corporation to change its general appearance into a special appearance, for the purpose of moving to dismiss the cause.

13. That thereafter said motion came on to be heard, and on or about April 5, 1889, an order was entered and filed by said Court, after hearing counsel for the respective parties, and after considering said affidavit of Salter S. Clark, Esq., which order provided that unless, within five days after the entry and service of said order upon the complainant's solicitors, the complainant should file and serve a stipulation withdrawing the amended complaint as to the defendant corporation, and stipulate to go to trial as to such defendant on said original bill of complaint, that then the notice of appearance entered on behalf of said defendant corporation should be amended as prayed for by said corporation, and that the service of said subpœna upon said defendant corporation should be set aside and quashed, and the bill of complaint dismissed as against said defendant corporation.

14. That the complainant did not serve the stipulation referred to in said order, filed on or about April 5, 1889, and that thereafter, it having been made to appear to said Court by the affidavit of William Cotter Dick, verified April 11, 1889, that said stipulation had not been filed and served, an order was made by said Court, dated April 11, 1889, amending the general appearance of the defendant corporation to a special appearance, by inserting the words prayed for in the defendants' said motion, and said order further provided as follows:

"And it is further ordered, adjudged and decreed, that the service of the subpœna *ad respondendum* in the above entitled cause (meaning the said cause) upon the defendant, The Hamburg-American Packet Company, be, and the same hereby is, set aside and quashed, and it is further ordered, adjudged and decreed, that the bill of complaint herein be, and the same hereby is, dismissed as against the said Hamburg-American Packet Company. Dated N. Y., Apr. 11, 1889. E. Henry Lacombe."

15. That thereafter, the complainant appealed from said order, dated April 11, 1889, to the Supreme Court of the United States, which appeal was allowed and filed in said Court May 25, 1889. That a bond upon said appeal for costs was approved and filed May 24, 1889, and that a citation on

said appeal was duly issued and filed in said Court, May 25, 1889.

16. That thereafter, and on or about October 7, 1889, the record in said cause was duly certified by the Clerk of said Court, and transmitted to the Supreme Court of the United States.

17. That said appeal appeared on the calendar of the Supreme Court of the United States, as Term No. 134, October Term. 1892.

That thereafter, in due course, said appeal came on to be argued before the Justices of the Supreme Court of the United States, on the 13th day of March, 1893, and was then argued by counsel for the appellant and for the appellee, The Hamburg American Packet Company, and that thereafter, and on or about March 27, 1893, the Supreme Court of the United States delivered an opinion dismissing said appeal for want of jurisdiction, upon the ground, among others, that said order of April 11, 1889, was not a final decree, inasmuch as the cause below was still proceeding against the defendants, other than the defendant Company.

18. Your petitioner is advised and believes that said order, dated April 11, 1889, made in said cause, was improperly made, and that your petitioner has no other relief except by way of mandamus from this Honorable Court; and your petitioner alleges that although the Hamburg-American Packet Company was organized under the laws of the Kingdom of Hanover, in the Empire of Germany, nevertheless said Company was, at the time of the service of the said subpœna, an inhabitant of the Southern District of New York, within the meaning of Section 1 of the Act of Congress of March 3, 1887, Chap. 373, as corrected by the Act of August 13, 1888, Chap. 866 (24 Stats., 352; 25 Stats., 433); and that said defendant Company had its office in said City of New York, and that the defendant, Henry R. Kunhardt, Sr., was a duly authorized general agent for said Company, in said City and State of New York, at such times, and that said Circuit Court for the Southern District of New York acquired jurisdiction over said defendant Company, by reason of the service of said subpœna, as aforesaid.

19. And your petitioner is advised and believes, and therefore avers, that the defendant corporation, by interposing a general appearance, as aforesaid, by securing extensions of time to answer or plead, by interposing a demurrer, and by serving notice of hearing upon the bill of complaint, demurrer, pleadings and other proceedings, waived any objections or

rights they may have had to object to the jurisdiction of said Court.

20. Your petitioner further alleges, that, by said order of said Circuit Court of the United States, for the Southern District of New York, dated April 11, 1889, he is prevented from exercising his right to sue the said Hamburg-American Packet Company in the manner he is advised he is entitled to do by said Acts of Congress above mentioned—that is to say, in the Southern District of New York, the district in which the said defendant corporation was an inhabitant and resident at the time of the service of said writ of subpœna, and inasmuch as said order is not, and has been held by the Supreme Court of the United States not to be, a final order, your petitioner further alleges that he is without any adequate remedy to compel the said Circuit Court to exercise the said jurisdiction.

21. That all of the foregoing matters and things alleged in this petition are fully and at large shown in the record on file in the office of the Clerk of the Supreme Court of the United States, in the matter of a certain appeal, numbered Term No. 134, October Term, 1892, between Friedrich Hohorst, appellant, and the Hamburg-American Packet Company, appellee, which appeal was argued as aforesaid, and in which an opinion was rendered, dismissing said appeal for want of jurisdiction, on or about March 27, 1893, and your petitioner refers to the record as certified to this Honorable Court in said appeal as a part of, and in corroboration of, this petition.

Wherefore, your petitioner prays that this Honorable Court will issue a writ of mandamus, commanding the Judges of the Circuit Court of the United States for the Southern District of New York, to take jurisdiction and proceed against the Hamburg-American Packet Company in the suit now pending and undetermined in the said Circuit Court of the United States for the Southern District of New York, wherein your petitioner, Friedrich Hohorst, is complainant, and the Hamburg-American Packet Company and others are defendants, and to strike from the record the order made in said suit, bearing date April 11, 1889, whereby the general appearance of said defendant corporation was amended to a special appearance, and whereby the service of subpœna *ad respondendum* upon said defendant corporation was set aside and quashed, and whereby said bill of complaint was dismissed, and commanding said Judges thereupon to make such disposition of said suit as ought to have been made had

the said order not been made and entered therein; and your petitioner further prays that this Honorable Court will grant to your petitioner such other and further relief, or both, in the premises as may be just.

And your petitioner will ever pray.

Dated the 25th day of April, 1893.

Friedrich Hohorst,
By Walter S. Logan, Atty.

Charles McDermond
of counsel.

STATE OF NEW YORK, }
City and County of New York, } ss.:

WALTER S. LOGAN, being duly sworn, says: I am one of the solicitors and counsel for Friedrich Hohorst. I was such solicitor and counsel in all of the proceedings set forth in the foregoing petition, and have personal knowledge thereof. I have read the foregoing petition, and know its contents, and the same is true to my knowledge, information and belief. The matters therein stated are furthermore substantiated by the certified record on file in the Supreme Court of the United States, as set forth in said petition.

The reason why this petition is not verified by the complainant is that I am personally familiar with all of the proceedings taken in said cause, as the solicitor and counsel for the complainant, and the complainant is not familiar with the various proceedings taken by his solicitors on his behalf.

Sworn to before me this 25th day of April, 1893. } Walter S. Logan.

F. H. Knight,
Notary Public,
New York Co.

L. S.

Supreme Court of the United States.

Ex parte

FRIEDRICH HOHORST.

Brief for Petitioner.

FACTS.

This matter comes before this Court upon a petition for a mandamus directing the Circuit Court of the United States, for the Southern District of New York, to set aside and strike from its record an order vacating and setting aside the service of a subpœna in a suit brought in said Court by the petitioner against the Hamburg-American Packet Company, and directing said Court to take jurisdiction of said action against said defendant company.

The action was brought for infringement of a patent owned by the petitioner. It was brought against the defendant company and against other defendants who composed the firm of Kunhardt & Company, which firm were the general agents in New York City of the defendant company. The defendant company was created in the Empire of Germany.

The subpœna was duly served on one of the agents of the defendant in the City of New York. All of the defendants thereafter appeared generally and demurred. The bill of complaint was, on motion, allowed to be amended by inserting allegations showing the joint liability of the defendants and the agency of the defendants, other than the defendant company. (The agency of Kunhardt & Co. is admitted). The amended bill of complaint was filed upon the granting of said motion, and thereafter the defendant company moved

for leave to change its general appearance into a special appearance and to dismiss the bill, and this motion was granted April 11, 1889.

All of these facts, and many others, appear in the petition for the writ of mandamus, and also in the record of an appeal taken from such order on file in this Court, the number being 134, of October Term, 1892, which appeal was dismissed March 27, 1893.

SPECIFICATIONS OF ERRORS.

The Court below erred in dismissing the bill for the following reasons:

1. Because the defendant, by appearing generally and demurring to the bill, had waived its personal exemption (if any).

2. Because the defendant, being a European corporation, was not within the meaning of the Act regulating service of process, and hence could be sued so far as jurisdiction of its person was concerned in any district.

3. Because the defendant, if within the meaning of the Act, was an inhabitant of the Southern District of New York.

4. Because the decision should not have been made dismissing the bill in any event, as the Court had jurisdiction.

POINTS.

I.

Mandamus is the proper remedy in cases where the action of the Court below does not lie in discretion, where a Judge refuses to do an act in a matter properly before him, or refuses to take jurisdiction in a proper case.

Re Life and Fire Insurance Co., 8 Peters, 291.
Ex parte Milwaukee Co., 5 Wall, 825.
Ex parte Bradley, 7 Wall, 364.
Ex parte Zellner, 9 Wall, 244.

R. R. Co. *v.* Wiswall, 23 Wall, 507.
Ex parte Parker, 120 U. S., 737.
Ex parte Brown, 116 U. S., 401.
Re Farmers' Loan and Trust Co., 129, U. S., 206.
Re Parker, 131 U. S., 221.
Ex parte Jordan, 94 U. S., 248.
Ex parte R. R. Co., 95 U. S., 221.

II.

The remedy by mandamus is especially applicable in cases where a writ of Error or an appeal will not lie.

This Court, by opinion on the appeal taken by the petitioner, which opinion was rendered March 27, 1893, held that the appeal should be dismissed for want of jurisdiction, because the order below was not a final order.

This being the case, if the Court below had jurisdiction and should not have made the order, mandamus will lie.

Insurance Co. *v.* Comstock, 16 Wall, 258.
Re Connecticut Mutual Life Insurance Co., 131 U. S, CLXXX.

III.

The exemption of a party from suit, except in the district of which he is an inhabitant, does not apply to non-resident foreign corporations under Section I of the Act of Congress of March 3, 1887, as corrected by the Act of August 13, 1888.

As to corporations incorporated in one State and sued in another, it has been finally settled, after much discordant decision in the Circuit courts, that a corporation incorporated in this country can be an inhabitant, under the meaning of

the Act, only of the State by which it was originally created (Shaw *v.* Quincy Mining Co., 145, U. S., 444). But so far as I have found, the question of a non resident alien or foreign corporation has never arisen before. It is distinctly saved out for future decision in the case of Shaw *v.* Quincy Mining Co., with the suggestion that the rule as to them may be different. The language of the Court is as follows:

> "This case does not present the question what may be the rule in cases against an alien or foreign corporation. *which may be governed by different considerations;* nor does it affect cases in admiralty, for those have been adjudged to be without the scope of the statute *in re* Louisville Underwriters, 134 U. S., 488. All that is now decided is that under the existing Act of Congress a corporation incorporated in one State only cannot be compelled to answer in a Circuit Court of the United States, held in another State in which it has its usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State."

As the case at bar is a patent suit, we do not come within the clause of the statute which allows suit to be brought in the residence of the complainant, since jurisdiction is not founded *only* on the fact that the action is between citizens of different States. Therefore this case presents clearly the question whether the first clause of the statute was intended by Congress to apply to non-resident aliens or foreign corporations. It says:

> "No civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant."

Did Congress mean to include under the phrase "any person," non-resident aliens or foreign corporations?

The cases state that this provision was intended to prevent the hardship to a defendant which would result from compelling him to answer a suit away from home. The result of the interpretation contended for by the other side in this case would be the escape of all foreigners and foreign corporations from all liability in a vast number of cases; that, too, in spite of the Constitution, which says :

> "The judicial power shall extend to *all* cases, in law or in equity, arising under the laws of the United States, and to controversies between a State and the citizens thereof and *foreign* States, citizens or subjects,"

and of the Revised Statutes, which say (Sec. 629):

> "A circuit court shall have original jurisdiction, as follows: 9th. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

If this be the meaning of Congress, then this complainant cannot sue this defendant in any district in the United States; and as this is a case of which the Federal courts have exclusive jurisdiction, he cannot sue in any State court. All the great steamship lines, which have been infringing this patent for years, would be exempt from liability. No suit on any cause of action arising under the United States laws—patents, copyrights, customs, etc.—causes which the Federal courts were specially instituted to hear—could be brought by any one against a non-resident alien or foreign corporation. The numerous foreign insurance, steamship, cable, land and trading companies, could maintain unlimited business relations here, and in them wholly ignore all Federal laws and penalties.

On the other hand, these same courts would be open to the same foreigners, as complainants, on similar causes of action. On causes of action where the Federal court had concurrent jurisdiction with the State court, the citizen could sue the foreigner in a Federal court by suing in the district of his own residence; or, if he sued in the State court, the foreigner could remove the case into the Federal court; but where the Federal court had exclusive jurisdiction, the citizen could not sue the foreigner at all. No non-resident alien could be sued by attachment or arrested, though it is against just such persons that attachments and arrests are most needed.

It is not reasonable to suppose that Congress really intended any such result. Nor do the words used compel such a construction. The whole law, of which this provision is a part, is one giving, not prohibiting, jurisdiction to the Circuit Courts, and this particular clause does not mean to say as to any person whatsoever, that he shall not be sued at all, but simply to provide *where he shall be sued*. Omitting words not involved, the clause reads: "No suit shall be brought against any person, in any other district than that whereof he is an inhabitant." It is not at all unreasonable to say that some such phrase as "an inhabitant of the United States" is understood after "person." On the contrary, the last clause, "whereof he is an inhabitant," clearly implies that the sup-

posed defendant—the "any person" intended—is one having a home district in the United States.

In Sec. 11 of the Judiciary Act of 1789, and Sec. 739 of the Revised Statutes, which were the law upon this subject up to 1875, the phrase stood:

> "No civil suit shall be brought . . . against *an inhabitant of the United States* in any other district than that whereof he is an inhabitant, or in which he shall be found."

The Statute of 1875 subtituted "any person" for "an inhabitant of the United States," but this very statute proves that in this change Congress did not mean to take away the jurisdiction of the Circuit Courts over foreigners, by permitting suit to be brought wherever the defendant may be *found*. The Supreme Court, speaking of this, has said (134 U. S., 491):

> "The provision of Section 11 of the Act of 1789, embodied in Section 739 of the Revised Statutes, was reenacted, *with no material alteration*, in the Act of March 3, 1875, Chap. 137, Section 1."

This construction is no more liberal than this very clause has already undergone at the hands of this Court in the two cases of Atkins *v.* Disintegrating Co., 18 Wallace (85 U. S., 272), and Louisville Underwriters, 134 U. S., 488. These cases held that Congress did not intend, under the term "civil suit," and "any process or proceeding," to include admiralty cases, even where they were proceedings *in personam*.

The Atkins case was one brought by libel in the Eastern District of New York against a corporation of New Jersey. Jurisdiction of the person was obtained, not by service of process, but by attachment of the defendant's property. *Held*, that the Court had jurisdiction. The opinion uses the following language (*page 301*):

> "It may be admitted that an admiralty case is a civil suit in the general sense of that phrase, but that is not the question before us. It is whether that is the meaning of that phrase as used in this section. The intention of the lawmaker constitutes the law. *A thing may be within the letter of a statute and not within its meaning*, or within its meaning though not within its letter. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, statute, or series of statutes *in pari materia*. The general language found in one place may be restricted in its effect by the particular expres-

sions employed in another, if such, upon a careful examination of the subject, appears to have been the intention of the enactment."

In the Louisville Underwriters' case, a corporation of Kentucky, was sued in a district of Louisiana, by a libel in admiralty *in personam*. There was no attachment, but jurisdiction was obtained by service of process upon an agent of the Company in that district. *Held*, the Court had jurisdiction. The opinion (by Mr. Justice Gray) quotes, with approval, the reasoning in the Atkins case, adding (*page 493*):

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons, or his goods or credits attached, would not only often put him to great delay, inconvenience and expense, but would, in many cases, amount to a denial of justice."

It is to be noted that the Atkins case arises under the provision as it was prior to the Statute of 1887, but that the Louisville Underwriters' case arises under the Statute of 1887, which struck out the provision that a defendant might be sued where he could be found. The Court says (page 492): "This change, far from weakening the reason of the decision in Atkins *v.* Disintegrating Company, above cited, greatly strengthens it."

In Societe Fonciere *v.* Milliken, 135 U. S., 304, the defendant was a foreign corporation, and the point in the case at bar was not directly made or passed upon, but the opinion indicates what the decision would have been on that point, in the following words, Mr. Justice Brewer writing the opinion:

> "In what county suit may be brought is determined by other sections, which need not be cited here, as the right to sue in the Federal Court is not questioned. So, the Court having jurisdiction of the cause of action, service might be made upon the local agent representing the society. Du Bellet was unquestionably such agent, and service upon him was sufficient to bring the society into court."

If, therefore, the Act of 1887 does not apply to foreign corporations, this defendant, The Hamburg-American Packet Company, could have been sued in any Federal district; and the Circuit Court for the Southern District of New York had

jurisdiction of its person, both because service was made there, and because it appeared in the action.

IV.

The defendant, by appearing generally and submitting its whole case to the Court by demurrer, waived any right to object to the Court's jurisdiction over its person.

The provision of the statute is as follows:

> "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; and where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This prohibition does not affect the general jurisdiction of the Court. It is a privilege or exemption personal to a defendant, which he may waive or not as he pleases. This has been decided so often in this Court that citations from authorities are not necessary (*ex parte* Schollenberger, 96 U. S., 369).

Any submission of himself, or the merits of his case to the Court, is a waiver of the personal exemption. To take advantage of it the defendant must raise that point, and that point only, and raise it before he does anything else in the case. A general appearance, whether after service ot subpœna or voluntarily, waives it. The character of the cause of action makes no difference. An appearance is not an appearance to a particular bill of complaint, but to any complaint which the complainant may make. If the defendant does not want to submit himself to that Court, he must stay out. If he comes in, the question of jurisdiction of the person is at an end.

Here the defendants not only appear generally, but obtain an extension of time to answer, file a demurrer raising the question of multifariousness, want of equity and "divers other good causes of demurrer," and give notice of hearing

upon such demurrer. The case, therefore, falls directly within the following decisions of the Supreme Court:

Jones *v.* Andrews, 10 Wallace (77 U. S., 327), was a suit brought in the Circuit Court of West Tennessee, neither the plaintiff nor the defendant being citizens of that State. The defendant appeared and immediately made a motion to dismiss the bill upon two grounds—first, that it did not show facts in relation to citizenship or residence of the defendant sufficient to give the Court jurisdiction; second, that it showed the complainant had an adequate remedy at law. *Held*, the demurrer waived the personal exemption. The opinion says:

> "Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide; *his moving to dismiss for want of equity was clearly a waiver*, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

St. Louis *v.* McBride, 141 U. S., 127, decides exactly the same question in the same way. In this case a corporation of Missouri was sued in the Western District of Arkansas. It did not appear whether the appearance was voluntary or after service. The defendant demurred on three grounds: (1). Because the Court had no jurisdiction of the person of the defendant; (2). Because the Court had no jurisdiction of the subject matter of the action; and (3). Because the complaint did not state facts sufficient to constitute a cause of action. *Held*, that the demurrer was a waiver of the personal exemption, the opinion (by Mr. Justice Brewer) saying:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the action was one of which the Court could take jurisdiction, *such an appearance waives not only all defects in the service, but all special privileges of the defend-*

ant in respect to the particular court in which the action is brought."

That a general appearance alone constitutes a waiver of the personal exemption is recognized in Shaw *v.* Quincy Mining Company, 145 U. S., 144, the opinion saying that as the appearance in that case was special, there was no question of waiver, and adding:

"*Such as has been recognized where a defendant has appeared generally* in a suit between citizens of different States brought in the wrong district" (referring to Gracie *v.* Palmer, 8 Wheaton, 699).

In Gracie *v.* Palmer, 8 Wheaton, 699, Chief Justice Marshall says:

"The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was a privilege of the defendant which he might waive by a voluntary appearance. If process was returned by the marshal, as served upon him within the district, it was sufficient; but that where the defendant voluntarily appeared in the court below without taking the exception, it was an admission of the service and a waiver of any further inquiry into the matter."

V.

The amendment of the general appearance into a special appearance does not change the case.

First.—Amending the appearance does not amend the demurrer, or change its effect. The waiver accomplished by the demurrer remained, whether the appearance was amended or not.

Second.—A court of original jurisdiction has no power to allow a defendant to change his general appearance into a special appearance. Appearance relates solely to jurisdiction of the person, and a general appearance is a complete submission of the person to the Court. No one is compelled to appear, but, having done so, the fact is accomplished. He is in court. It completely changes the status. Rights instantly

arise in the complainant of which the Court cannot deprive him. Jurisdiction of the person, like jurisdiction of the cause of action, once acquired, cannot be surrendered. The subpœna says, "you are hereby commanded to appear;" the defendant obeys the command; and that is an end of the matter.

In Creighton *v.* Kerr, 87 U. S., 8, which was a case begun by attachment, the opinion says:

> "A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem;* this result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. * * * * The appearance gives rights and benefits in the conduct of a suit, to destroy which, by a withdrawal, would work great injustice to the other party. Such was the case of Eldred *v.* Bank."

In Eldred *v.* Bank, 12 Wallace (84 U. S.), 545, the defendant had filed a plea, and had afterwards withdrawn the same without objection from the plaintiffs. The question in the case was whether the judgment thereafter entered by the plaintiffs was a personal judgment against that defendant, he not having been served with process in the beginning. The Court (Mr. Justice Miller delivering the opinion) says:

> "The filing of the plea was both an appearance and a defence. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. He was not, by the withdrawal of the plea, out of court."

The Court below refers, in its opinion, to the case of United States *v.* Yates, 6 How., 605, as allowing a general notice of appearance to be amended so as to make it special. His Honor has, however, misapprehended this case. It is a case directly in our favor upon this very point. It holds that the appearance of the party, once made, cannot be withdrawn, although the attorney, under special circumstances, may be allowed to withdraw. This decision was made with reference to a citation on appeal, and, as the opinion states, the reason for it is even stronger in the case of courts of original jurisdiction. Chief Justice Taney, in the opinion, says:

> " Upon the affidavits filed the Court will permit the attorney who has appeared for the appellees to withdraw his appearance. *But this leave will not authorize a motion to dismiss for want of a citation* nor for mere irregularity in its service, providing the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, *and he cannot afterwards withdraw it.* . . . The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in the court exercising original jurisdiction do not apply in an appellate court."

Third.—Even if the Court had power to amend the appearance, there was no case made here for doing so. The defendant states that having raised the question of non-jurisdiction of the person, by his demurrer to the original bill, this objection was taken away by the filing of the amended bill. The trouble with this claim is that the demurrer instead of raising the objection had really waived it. The amended bill, therefore, did not change the situation. Had we gone to hearing on the original bill and the demurrer, that point could not have been raised. The labored explanation of why a general appearance and a demurrer were filed, is wholly immaterial.

As a matter of fact this motion was merely a subterfuge to get rid of the effect of an act deliberately done but repented of afterward. The defendant knew, as soon as the subpœna was served, whether it wished to be sued in the Southern District of New York. It was not necessary for it to see the bill, and it made no difference what the bill contained. If it had been a suit at law instead of in equity, there would have been (in many States) no bill filed prior to appearance.

It is no answer to our position here that if we had waived our amended bill, and gone back to the original bill, the Court would have retained jurisdiction. We were entitled to have it retain jurisdiction in any event. In addition to that it would have been unfair to compel us to give up an amended bill which contained an amendment about joint infringement, in addition to the amended alligations as to inhabitancy.

VI.

The defendant corporation was an inhabitant of the Southern District of New York, and was duly served with process therein.

The opinion of the Court below does not clearly indicate whether the decision was based upon the defendant being a foreign corporation, or because he considered that it was an inhabitant of the District of New Jersey.

If it be held that non-resident aliens and foreign corporations are within the act of 1887, it seems to follow inevitably, under the reasoning in Shaw *v.* Quincy M. Co., 145 U. S., 444, that they cannot be sued in any Federal court. I do not see how they can be inhabitants of a foreign country and of this country also. To be sure, the Supreme Court decisions, so far, have been made with reference to domestic corporations only, and they must have a domicile in some State; but I see no way of stopping the logic at that point.

In this light it is useless to consider whether the defendant, The Hamburg-American Packet Company, can be more properly considered an inhabitant of New York or of New Jersey. It was either not an inhabitant of the United States at all, and therefore (if the law applies) cannot be sued anywhere, or else the law does not apply, and it can be sued anywhere.

If, however, there is a way of holding foreign corporations inhabitants of the United States, then I submit that, under the facts shown, the defendant here was an inhabitant of the Southern District of New York. The amended complaint alleges that Kunhardt & Co. were its general agents in this country, and that their office as such was in the City of New York. This was not denied by the defendant's affidavits, on which this motion was based, and these affidavits specifically allege that the Company advertises that it had an office in the City of New York, and that the usual monetary and financial transactions of the Company were conducted there. Its steamers, however (so they say), came to New Jersey. It would seem more proper to put the habitation of a corporation where the head rather than where the body is—that is, where the actual responsible managers do the business, and where the books are kept, rather than where some of the property lies, and where the longshoremen wheel their trucks.

VII.

The injustice of exempting corporations from liability to be sued in the place where they do business or have agents is well shown by the opinion of Mr. Justice Field in the case of St. Clair *v.* Cox, 106 U. S., 355. Although this case arose out of different facts than those in the present case, the reason for the rule laid down applies very strongly to cases of *European* corporations, that endeavor to avoid responsibility in any part of the whole United States.

> "This doctrine of the exemption of a corporation from a suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the Legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.
>
> All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers

and agents constitute all that is visible of its existence; and they may be authorized to act for it without, as well as within, the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions."

See also *ex parte* Schollenberger, 96 U. S., 369.

VIII.

The petition should be granted, and a rule should be issued unless the Court think that a peremptory mandamus should issue in the first instance.

CHARLES M. DEMOND,
Counsel for Petitioner.

Supreme Court of the United States.

Ex parte

FRIEDRICH HOHORST.

Brief of Petitioner.

FACTS.

This matter comes before this Court upon a petition for a mandamus directing the Circuit Court of the United States, for the Southern District of New York, to set aside and strike from its record an order vacating and setting aside the service of a subpoena in a suit brought in said Court by the petitioner against the Hamburg-American Packet Company, and directing said Court to take jurisdiction of said action against said defendant company.

The action was brought for infringement of a patent owned by the petitioner. It was brought against the defendant company and against other defendants who composed the firm of Kunhardt & Company, which firm were the general agents in New York City of the defendant company. The defendant company was created in the Empire of Germany.

The references in this brief refer to the record on

the appeal [which is hereinafter mentioned], unless otherwise indicated.

The following are the proceedings and papers in the case upon which the order is based.

September 5, 1888, original bill filed for infringement of patent [fol. 3]. September 17, 1888, subpoena served on Henry R. Kunhardt, Sr., a member of Kunhardt & Company, the general agents for the Hamburg-American Packet Company in this country [fol. 2]. November 5, 1888, defendant Company filed its general appearance [fol. 12]. November 27, 1888, defendant's time to answer or plead extended by consent [fol. 43]. December 18, 1888, defendant files demurrer to bill upon the following grounds: [1] that the causes of action against the several defendants are distinct and unconnected, and hence that the bill is multifarious; [2] that the bill does not "state a case entitling complainant to any relief, because it appears by the bill that the Court had no jurisdiction of the defendant for the purpose of entertaining such a suit;" and [3] for "divers other good causes of demurrer appearing in the said bill of complaint" not otherwise specified [fol. 13.] December 24, 1888, motion by complainant to amend bill [fol. 17.] January 7, 1889, motion by defendant to dismiss the bill [fof. 44.] January 31, 1888, complainant's motion to amend granted; defendant's motion to dismiss denied [fols. 21 and 44.] February 2, 1889, amended bill filed [fol. 23.] February 16, 1889, defendants serve notice of final hearing upon the bill of complainent and demurrer [fol. 44.] February 23, 1889, defendant moves to amend its general appearance into a special appearance for the purpose of moving to dismiss on the ground of non-jurisdiction of the person; and also moved to dismiss [fol. 28.] April, 1889, order granted that unless complainant withdraws his amended complaint, the defendants have leave to amend

their general appearance into a special appearance, and that the case be dismissed [fol. 50.] April 11, 1889, decree amending the general appearance into a special appearance, and dismissing the bill as to the Hamburg-American Packet Compnny [fol. 53.]

The defendants are the Hamburg-American Packet Company and several individual defendants, members of the firm of Kunhardt & Company, the general agents for said Company in this country. The only difference between the original bill and the amended bill, is the insertion of the word "jointly" in the allegation of defendant's infringement; and the insertion of an allegation showing the relation of the Hamburg-American Packet Company to the individual defendants (fols. 17, 21 and 22), and that said Company is an inhabitant of, and with a place of business in New York State.

Upon the motion to dismiss, the statements as to the position of the Hamburg-American Packet Company in this country were presented as follows:

(1) The amended bill alleged as follows (fol. 25):

> "Your orator further states, that all of the defendants above named are inhabitants of the City and County of New York: that the defendant, the Hamburg-American Packet Company, has its principal business office in this country located in the City and County of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester are, and during the time of the infringement above set forth were, co-partners under the firm name of Kunhardt & Company; and as such co-partners are, and were, the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal office as such located in the City and County of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all of said acts and infringements."

(2) The affidavit of R. J. Cortis alleged that

the Company was incorporated in Europe, and had its principal office and place of business in Germany; that the residence of its directors and stockholders was in Germany; and that as he understood the meaning of the term, the Company was not an inhabitant of New York (fol. 29.)

(3) The affidavit of Arend Behrens, one of the defendants, a member of Kunhardt & Company, alleged that Kunhardt & Company were the agents for the Hamburg-American Packet Company, that the Hamburg-American Packet Company advertised that it had an office in New York City; that such office was the office of Kunhardt & Company, which was, however, rented by Kunhardt & Company, and in their control; *and that in such office, and by Kunhardt & Company, as such agents, the usual monetary and financial transactions of the company were conducted*: but that the company had its docks, and landed its steamers in New Jersey. [fol. 41.]

All of these facts and many others appear in the petition for the writ of mandumus, and also in the record of an appeal taken from such order on file in this Court, the number being 134, of October Term, 1892, which appeal was dismissed March 27, 1893. This record has been made a part of the

The rule to show cause upon the petition herein was issued May 10, 1893, and thereafter was duly served upon the Judges of the Circuit Court of the United States, who have filed a return to the rule.

This return does not deny any of the allegations of the petition.

The return recites various proceedings taken in said appeal, all of which appear more fully in the said record of this appeal to this court.

The return also sets forth [pages 3 and 4 of the return] an order [which was made at the same time as the order allowing the amendment of the com

plainant's bill], which first-mentioned order denied the defendant's motion to dismiss the bill and also sets forth a stipulation signed by both counsel for complainant and for the defendant company, extending the time for said company and the other defendants to plead, answer, demur, or to make motions.

This order and stipulation, we submit, give additional strength to the petitioner's contention, namely, that the defendant company waived any rights it may have had to object to the service of the subpœna herein.

The return sets forth the reasons which actuated the Court below in dismissing the bill, as follows:

> 1. That upon the facts as presented to this respondent, E. Henry Lacombe, by all the pleadings, papers and other proceedings had in said suit, certain of which are made a part of the petition upon which the said bill to show cause is granted, it was made to appear to his satisfaction, and he accordingly found, that the defendant corporation had originally made a general, instead of a special, appearance in said suit, in consequence of justifiable mistake on its part as to the real nature of said suit; that said mistake was occasioned by said petitioner's own acts, to wit: the original allegations of his bill prior to amendment, that said corporation defendant had not waived the consequences of said mistake, and that therefore said corporation was, in the discretion of this respondent, equitably entitled to an amendment of its said general into a special appearance, nunc pro tunc, unless said petitioner on his part should abide by and consent to go to trial upon said original allegations without amendment.
>
> 2. That upon the facts as presented to this respondent, E. Henry Lacombe, by the affidavits and all other papers, pleadings and proceedings had in said suit, as more fully set forth in the Record referred to in said petition, that the defendant, Hamburg-American Packet Company is a corporation organized and existing under the Laws of the Kingdom of Hanover, Empire of Germany, and is not, and was not, an inhabitant of the Southern District of New York at the time of the service of said subpœna upon said Henry Kunhardt, Sr., within said District.
>
> 3. That upon the facts as presented to said respondent

by the affidavits and all other papers, pleadings and proceedings had in said suit, as more fully set forth in said Record, it does not appear that the said Henry Kunhardt, Sr., was, at any time, the general agent of the said corporation defendant or such an agent as that service upon him of subpœna in said suit was sufficient to confer Jurisdiction over said corporation defendant.

SPECIFICATION OF ERRORS.

The Court below erred in dismissing the bill for the following reasons:

1. Because the defendant. by appearing generally and demurring to the bill, had waived its personal exemption [if any].

2. Because the defendant, being a European corporation, was not within the meaning of the Act regulating service of process, and hence could be sued so far as jurisdiction of its person was concerned in any district.

3. Because the defendant, if within the meaning of the Act, was an inhabitant of the Southern District of New York.

4. Because the decision should not have been made dismissing the bill in any event, as the Court had jurisdiction.

POINTS.

I.

Mandamus is the proper remedy in cases where the action of the Court below does not lie in discretion, where a Judge refuses to do an act in a matter properly before him, or refuses to take jurisdiction in a proper case.

Re Life and Fire Insurance Co., 8 Peters, 291.
Ex parte Milwaukee Co., 5 Wall., 825.
Ex parte Bradley, 7 Wall., 364.
Ex parte Zellner, 9 Wall., 244.
R. R. Co., *v.* Wiswall, 23 Wall., 507.
Ex parte Parker, 120 U. S., 737.
Ex parte Brown, 116 U. S., 401.
Re Farmers' Loan and Trust Co., 129 U. S., 206.
Re Parker, 131 U. S., 221.
Ex parte Jordan, 94 U. S., 248.
Ex parte R. R. Co., 95 U. S., 221.

II.

The remedy by mandamus is especially applicable in cases where a writ of Error or an appeal will not lie.

This Court, by opinion on the appeal taken by the petitioner, which opinion was rendered March 27, 1893, held that the appeal should be dismissed for want of jurisdiction, because the order below was not a final order.

This being the case, if the Court below had jurisdiction and should not have made the order, mandamus will lie.

Insurance Co. *v.* Comstock, 16 Wall., 258.
Re Connecticut Mutual Life Insurance Co., 131 U. S., CLXXX.

III.

The defendant, by appearing generally and submitting its whole case to the Court by demurrer, waived any right to object to the Court's jurisdiction over its person.

The provision of the statute is as follows:

> "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; and where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

This prohibition does not affect the general jurisdiction of the Court. It is a privilege or exemption personal to a defendant, which he may waive or not as he places. This has been decided so often in this Court that citations from authorities are are not necessary (*ex parte* Schollenberger, 96 U. S., 369.)

Any submission of himself, or the merits of his case to the Court, is a waiver of the personal exemption. To take advantage of it the defendant must raise that point, and that point only, and raise it before he does anything else in the case. A general appearance, whether after service of subpœna or voluntarily, waives it. The character of the cause of action makes no difference. An appearance is not an appearance to a particular bill of complaint, but to any complaint which the complainant may make. If the defendant does not want to submit himself to the Court, he must stay out. If he comes in, the question of jurisdiction of the person is at an end.

Here the defendants not only appear generally;

but obtain an extension of time to answer, file a demurrer raising the question of multifariousness, want of equity and "divers other good causes of demurrer," and give notice of hearing upon such demurrer. The case, therefore, falls directly within the following decisions of the Supreme Court:

Jones *v.* Andrews, 10 Wallace [77 U. S., 327], was a suit brought in the Circuit Court of West Tennessee, neither the plaintiff nor the defendant being citizens of that State. The defendant appeared and immediately made a motion to dismiss the bill upon two grounds—first, that it did not show facts in relation to citizenship or residence of the defendant sufficient to give the Court jurisdiction: second, that it showed the complainant had an adequate remedy at law. *Held*, the demurrer waived the personal exemption. The opinion says:

> "Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide; *his moving to dismiss for want of equity was clearly a waiver*, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

St. Louis *v.* McBride, 141 U. S., 127, decides exactly the same question in the same way. In this case a corporation of Missouri was sued in the Western District of Arkansas. It did not appear whether the appearance was voluntary or after service. The defendant demurred on three grounds: [1]. Because the Court had no jurisdiction of the person of the defendant; [2]. Because the Court had no jurisdiction of the subject matter of the action; and [3]. Because the complaint did not state facts sufficient to constitute a cause of action. *Held*, that the demurrer was a waiver of the per-

sonal exemption, the opinion [by Mr. Justice Brewer] saying:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the action was one of which the Court could take jurisdiction *such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.*

That a general appearance alone constitutes a waiver of the personal exemption is recognized in Shaw v. Quincy Mining Company, 145 U. S., 444, the opinion saying that as the appearance in that case was special, there was no question of waiver, and adding:

> *"Such as has been recognized where a defendant has appeared generally* in a suit between citizens of different States brought in the wrong district" (referring to Gracie v. Palmer, 8 Wheaton, 699).

In Gracie v. Palmer, 8 Wheaton, 699, Chief Justice Marshall says:

> "The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was a privilege of the defendant which he might waive by a voluntary appearance. If process was returned by the marshal, as served upon him within the district, it was sufficient; but that where the defendant voluntarily appeared in the court below without taking the exception, it was an admission of the service and a waiver of any further inquiry into the matter."

IV.

The amendment of the general appearance into a special appearance does not change the case.

First. Amending the appearance does not amend the demurrer, or change its effect. The waiver accomplished by the demurrer remained, whether the appearance was amended or not.

Second. A court of original jurisdiction has no power to allow a defendant to change his general appearance into a special appearance. Appearance relates solely to jurisdiction of the person, and general appearance is a complete submission of the person to the Court. No one is compelled to appear, but having done so, the fact is accomplished. He is in Court. It completely changes the status. Rights instantly arise in the complainant of which the Court cannot deprive him. Jurisdiction of the person, like jurisdiction of the cause of action, once acquired, cannot be surrendered. The subpœna says, "you are hereby commanded to appear;" the defendant obeys the command; and that is an end of the matter.

In Creighton v. Kerr, 87 U. S., 8, which was a case begun by attachment, the opinion says:

> "A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem;* this result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. * * * *
>
> The appearance gives rights and benefits in the conduct of a suit, to destroy which, by a withdrawal, would work great injustice to the other party. Such was the case of Eldred v. Bank."

In Eldred *v.* Bank, 17 Wallace [84 U. S.], 545,

the defendant had filed a plea, and had afterwards withdrawn the same without objection from the plaintiff. The question in the case was whether the judgment thereafter entered by the plaintiffs was a personal judgment against that defendant, he not having been served with process in the beginning. The Court [Mr. Justice Miller delivering the opinion] says:

> "The filing of the plea was both an appearance and a defense. The case stood for the time between one term and another with an appearanae and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the Court. He was not, by the withdrawal of the plea, out of Court."

The Court below refers, in its opinion, to the case of the United States *v.* Yates, 6 How. 605, as allowing a general notice of appearance to be amended so as to make it special. His Honor has, however, misapprehended this case. It is a case directly in our favor upon this very point. It holds that the appearance of the party, once made, cannot be withdrawn, although the attorney, under special circumstances, may be allowed to withdraw. This decision was made with reference to a citation on appeal, and, as the opinion states, the reason for it is even stronger in the case of courts of original jurisdiction. Chief Justice Taney, in the opinion, says:

> "Upon the affidavits filed the Court will permit the attorney who has appeared for the appellees to withdraw his appearance. *But this leave will not authorize a motion to dismiss for want of a citation* nor for mere irregularity in its service, providing the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorneys is an admission of notice on the record, *and he cannot afterwards withdraw it.* . . . The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in the Court ex-

ercising original jurisdiction do not apply in an Appellate Court."

Third. Even if the Court had power to amend the appearance, there was no case made here for doing so. The defendant states that having raised the question of non-jurisdiction of the person, by his demurrer to the original bill, this objection was taken away by the filng of the ameuded bill. *The trouble with this claim is that the demurrer instead of raising the objection had really waived it.* The amended bill, therefore, did not change the situation. Had we gone to hearing on the original bill and the demurrer, that point could not have been raised. The labored explanation of why a general appearance and a demurrer were filed, is wholly immaterial.

As a matter of fact this motion was merely a subterfuge to get rid of the effect of an act deliberately done but repented of afterward. The defendant knew, as soon as the subpoena was served, whether he wished to be sued in the Southern District of New York. It was not necessary for him to see the bill, and it made no difference what the bill contained. If it had been a suit at law instead of in equity, there would have been [in many States] no bill filed prior to appearance.

It is no answer to our position here that if we had waived our amended bill, and gone back to the original bill, the Court would have retained jurisdiction. We were entitled to have it retain jurisdiction in any event. In addition to that it would have been unfair to compel us to give up an amended bill which contained an amendment about joint infringement, in addition to the amended allegations as to inhabitancy.

We think this is a sufficient answer to the first reason assigned in the return, namely, that the order was made to relieve against a mistake. If

any mistake was made, it was one of law on the part of the attorney for the defendant company, who, by appearing, demurring and taking the proceedings he did, waived, instead of raised, the question.

We submit that the order was not discretionary. Not only was there no mistake which would justify an order such as this, but, furthermore, the granting of the order took away important and substantial rights of the complainant which had accrued—such rights as the Court had no power to impair. Under such circumstances, we submit that the order did not lie in discretion. There was no proof of fraud or bad faith, or anything of that character.

V.

The exemption of a party from suit, except in the district of which he is an inhabitant, does not apply to non-resident foreign corporation under Section I of the Act of Congress of March 3, 1887, as corrected by the Act of August 13, 1888.

As to corporations incorporated in one State and sued in another, it has been finally settled, after much discordant decision in the Circuit courts, that a corporation incorporated in this country can be an inhabitant, under the meaning of the Act, only of the State by which it was originally created (Shaw *v.* Quincy Mining Co., 145 U. S., 444). But so far as I have found, the question of a non-resident alien or foreign corporation has

never risen before. It is distinctly saved out for future decision in the case of Shaw *v.* Quincy Mining Co., with the suggestion that the rule as to them may be different. The language of the Court is as follows:

> "This case does not present the question what may be the rule in cases against an alien or foreign corporation, *which may be governed by different considerations;* nor does it affect cases in admiralty, for those have been adjudged to be without the scope of the statute *in re* Louisville Underwriters, 134 U. S., 488. All that is now decided is that under the existing Act of Congress a corporation incorporated in one State only cannot be compelled to answer in a Circuit Court of the United States held in another State in which it has its usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State."

As the case at bar is a patent suit, we do not come within the clause of the statute which allows suit to be brought in the residence of the complainant, since jurisdiction is not founded *only* on the fact that the action is between citizens of different States. Therefore this case presents clearly the question whether the first clause of the statute was intended by Congress to apply to non-resident aliens or foreign corporations. It says:

> "No civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant."

Did Congress mean to include under the phrase "any person," non-resident aliens or foreign corporations?

The cases state that this provision was intended to prevent the hardship to a defendant which would result from compelling him to answer a suit away from home. The result of the interpretation contended for by the other side in this case would be the escape of all foreigners and foreign corpor-

ations from all liability in a vast number of cases; that, too, in spite of the Constitution, which says:

> "The judicial power shall extend to *all* cases, in law or in equity, arising under the laws of the United States, and to controversies between a state and the citizens thereof and *foreign* states, citizens or subjects."

and of the Revised Statutes, which says [Sec. 629.]

> "A circuit court shall have originall jurisdiction, as follows: 9th. Of all suits at law or in equily arising under the patent or copyright laws of the United States."

If this be the meaning of Congress, then this complainant cannot sue this defendant in any district in the United States; and as this is a case of which the Federal Courts have exclusive jurisdiction, he cannot sue in any State Court. All the great steamship lines, which have been infringing this patent for years, would be exempt from liability. No suit on any cause of action arising under the United States laws—patents, copyrights, customs, etc.—causes which the Federal Courts were specially instituted to hear—could be brought by any one against a non-resident alien or foreign corporation. The numerous foreign insurance, steamship, cable, land and trading companies, could maintain unlimited business relations here, and in them wholly ignore all Federal laws and penalties.

On the other hand, these same courts would be open to the same foreigners, as complainant on similar causes of action. On causes of action where the Federal Court had concurrent jurisdiction with the State Court, the citizen could sue the foreigner in a Federal Court by suing in the District of his own residence; or, if he sued in the State Court, the foreigner could remove the case into the Federal Court; but where the Federal Court had exclusive jurisdiction, the citizen could not sue the foreigner at all. No non-resident alien could be sued by attachment or arrested, though

it is against just such persons that attachments and arrests are most needed.

It is not reasonable to suppose that Congress really intended any such result. Nor do the words used compel such a construction. The whole law of which this provision is a part, is one giving, not prohibiting, jurisdiction to the Circuit Courts and this particular clause does not mean to say as to any person whatsoever, that he shall not be sued at all, but simply to provide *where he shall be sued*. Omitting words not involved, the clause reads: "No suit shall be brought against any person, in any other district than that whereof he is an inhabitant." It is not at all unreasonable to say that some such phrase as "an inhabitant of the United States" is understood after "person." On the contrary, the last clause, "whereof he is an inhabitant," clearly implies that the supposed defendant—the "any person" intended—is one having a home district in the United States.

In Sec. 11 of the Judiciary Act of 1789, and Sec. 739 of the Revised Statutes, which were the law upon this subject up to 1875, the phrase stood:

> "No civil suit shall be brought . . . against *an inhabitant of the United States* in any other district than that whereof he is an inhabitant, or in which he shall be found.

The Statute of 1875 subtituted "any person" for "an inhabitant of the United States," but this very statute proves that in this change Congress did not mean to take away the jurisdiction of the Circuit Courts over foreigners, by permitting suit to be brought wherever the defendant may be *found*. The Supreme Court, speaking of this, has said (134 U. S., 491):

> "The provision of Section 11 of the Act of 1789, embodied in Section 739 of the Revised Statutes, was re-enacted, *with no material alteration*, in the Act of March 3, 1875, Chap. 137, Section 1."

This construction is no more liberal than this

very clause has already undergone at the hands of this Court in the two cases of Atkins v. Disintegrating Co., 18 Wallace [85 U. S., 272], and Louisville Underwriters, 134 U. S., 488. These cases held that Congress did not intend, under the term "civil suit," and "any process or proceeding," to include admiralty cases, even where they were proceedings *in personam*.

The Atkins case was one brought by libel in the Eastern District of New York, against a corporation of New Jersey. Jurisdiction of the person was obtained, not by service of process, but by attachment of the defendant's property. *Held*, that the Court had jurisdiction. The opinion uses the following language [*page 301*]:

> "It may be admitted that an admiralty case is a civil suit in the general sense of that phrase, but that is not the question before us. It is whether that is the meaning of that phrase as used in this section. The intention of the lawmaker constitutes the law. *A thing may be within the letter of a statute, and not within its meaning*, or within its meaning though not within its letter. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, statute or series of statutes *in parti materia*. The general language found in one place may be restricted in its effect by the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intention of the enactment."

In the Louisville Underwriters' case, a corporation of Kentucky, was sued in a district of Louisiana, by a libel in admiralty *in personam*. There was no attachment, but jurisdiction was obtained by service of process upon an agent of the Company in that district. *Held*, the Court had jurisdiction. The opinion [by Mr. Justice Gray] quotes, with approval, the reasoning in the Atkins case, adding [*page 493*]:

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with

> a summons, or his goods or credits attached, would not only often put him in great delay, inconvenience and expense, but would, in many cases, amount to a denial of justice."

It is to be noted that the Atkins case arises under the provision as it was prior to the Statute of 1887, but that the Louisville Underwriters' case under the Statute of 1887, which struck out the provision that a defendant might be sued where he could be found. The Court says [page 492]; "This change, far from weakening the reason of the decision in Atkins *v.* Disintegrating Company, above cited, greatly strengthens it."

In Societe Fonciere *v.* Milliken, 135 U. S., 304, the defendant was a foreign corporation, and the point in the case at bar was not directly made or passed upon, but the opinion indicates what the decision would have been on that point, in the following words, Mr. Justice Brewer writing the opinion:

> "In what county suit may be brought is determined by other sections, which need not be cited here, as the right to sue in the Federal Court is not questioned. So, the Court having jurisdiction of the cause of action, service might be made upon the local agent representing the society. Du Bellet was unquestionably such agent, and service upon him was sufficient to bring the society into court."

If, therefore, the Act of 1887 does not apply to foreign corporations, this defendant, The Hamburg-American Packet Company, could have been sued in any Federal district; and the Circuit Court for the Southern District of New York had jurisdiction of its person, both because service was made there, and because it appeared in the action.

VI.

The Act of March 3 1887, as corrected by the Act of August 13, 1888, should be construed by the Court so as to preserve in the Circuit Courts jurisdiction in patent cases over alien corporations. Such a construction is the only natural one.

Prior to the passage of the Acts of 1887 and 1888, the following provisions were in force:

1. Constitution of the United States, Article III, Sections 1 & 2; "The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may, from time to time, ordain and appoint."

"The judicial power shall extend to all cases in law and equity arising under * * the laws of the United States * * and to controversies between a State or the citizens thereof and foreign States, citizens or subjects."

2. Revised statutes of the United States, Section 629, Subdivision 9, (Act, July 8, 1870, Chapter 230, Sections 55, 106, Volume 16, Pages 206,215).

"The Circuit Courts shall have original jurisdiction as follows:

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

3. United States Revised Statutes, Section 711, Subdivision 5, (Act, July 8, 1870, Chapter 230, Sections 55, 56, 58, 106, Volume 16, Pages 206, 207, 215).

"The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the Courts of the several States.

Fifth. Of all cases arising under the patent-right or copyright laws of the United States."

4. United States Revised Statutes, Section 739, (Act, September 24, 1789, Chapter 20, Section 11,

Volume 1, Page 79; Act May 4, 1858, Chapter 27, Sections 1, 2, Volume 11, Page 272.)

> "No civil suit shall be brought before either of said Courts against an inhabitant of the United States by any original process in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ."

Such were the provisions in force when the following Act was passed.

5. Act of March 3, 1875, Chapter 137, Section 1, 18 Stats., 470.

This was an Act to determine the jurisdiction of the Circuit Court of the United States, &c., commonly called the Removal Act of 1875. Section 1, of this Act gives additional jurisdiction to the Circuit Courts and contains this clause:

> "And no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding."

The jurisdiction of the Circuit Courts continued as regulated by the Acts of March 3, 1875, and prior statutes until the passage of the following Acts.

6. Act of March 3, 1887, 24 Stats., 552; as corrected by the Act of August 13, 1888, 25 Stats., 433.

The above Acts amended Section 1, of the Act of March 3, 1875. The exact matter covered by the amendment will be given hereafter. The amended Section 1 contained the following language:

> "No civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

An exception is made in suits where jurisdiction is founded only on the fact that the action is between citizens of different states, in which case suit can be had in the district of the residence of either the plaintiff or defendant.

Except as above, the only material change made in Section 1 of the Act of 1875, was to raise the amount required for jurisdiction in the cases mentioned in said section, from five hundred dollars to two thousand dollars.

This appears from an analysis of Section 1, as it appears in the Act of March 3, 1875. We now set out Section 1, as it originally appeared in the Act of 1875, with the changes made by the Acts of 1887 and 1888. Words which were added by the Acts of 1887 and 1888 are enclosed by a parenthesis. Those omitted by said Acts are italicized. Section 1, then, will appear as follows:

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of (interest and) costs the sum or value of *five hundred* (Two thousand) dollars and arising under the Constitution or Laws of the United States, or treaties made or which shall be made under their authority, or in which (controversy) the United States are plaintiffs or petitioners or in which there shall be a controversy between citizens of different States (in which the matter in dispute exceeds, exclusive of interest and costs the sum or value aforesaid) or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects (in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,) and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable *therein* (by them.) But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court and no civil suit shall be brought before either of said courts against any persons by any original process or

proceeding in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving such process or commencing such proceeding except as hereinafter provided.* (But when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant) nor shall any Circuit or District Court have cognizance of any suit *founded on contract* (except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action) in favor of *an* (any) assignee (or of any subsequent holder if be payable to bearer and be not made by unless *a* (such) suit might have been pr court to recover thereon (the said conte ment (or transfer) had been made, *e promissory notes negotiable by the law o of exchange*, and the Circuit Courts shall also have appellate jurisdiction from the District Courts under the regulations and restrictions prescribed by law."

CONSTRUCTION OF THE FOREGOING STATUTES.

The Act of March 3, 1875, did not, nor was it designed to, limit the jurisdiction of the Circuit Courts. On the contrary, it was the intention of Congress, by this Act, to make the original jurisdiction of the Circuit Courts co-extensive with the grant of judicial power given by the Constitution, except only in the cases in which the Supreme Court is given exclusive jurisdiction by Section 687 of the Revised Statutes.

Ames vs. Kansas, 111 U. S., 449, 469 to 472.

Mutual Life Insurance Co. vs. Champlin 21 F. R., [redacted] 85, 89.

The burden of proof is, so to speak, on him who contends for a restricted construction of the powers granted to the Circuit Courts by the Act of 1875.

In the case of Ames vs. Kansas, 111 U. S., at page 471, etc., the Supreme Court (Mr. Chief Justice Waite delivering the opinion) states as follows:

> "The language of the Act of 1875 in this particular is identical with that of the constitution, and the evident purpose of Congress was to make the original jurisdiction of the Circuit Courts co-extensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance. To quote again from Chief Justice Marshall, in Cobens v. Virginia, p. 379, 'the jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows, that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the Constitution which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.' This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to *all* cases arising under the Constitution and laws, and the act of 1875 commits the exercise of that power to the Circuit Courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the Circuit Courts to sustain their exception ' no the spirit and true meaning of the act, which spirit and true meaning must be so apparent as to overrule the words its framers have employed.' To the extent that the words conflict with other laws giving exclusive original jurisdiction to the Supreme Court this has been done, but no more. The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among courts."

The Act of 1875 did not affect, either affirmatively or negatively, the exclusive jurisdiction of the Circuit Courts under various prior statutes. The Act was only intended to apply to those ordinary suits to which similar words, in Section 11th of the Act of September 24, 1789, and in clauses 1, 2, & 3 of Section 629, Revised Statutes, by their connection and context, were necessarily confined.

United States vs. Mooney. 11 F. R., 476; 116 U. S., 104.

In the case of United States vs. Mooney, *supra*; it was argued in the Supreme Court that the Act of March 3, 1875, covered all classes of cases in which judicial power could be conferred on the Circuit Courts. that the Act was complete in itself, and that, therefore, all previous acts conferring jurisdiction were repealed.

The Supreme Court repudiated this construction of the Act, because it would lead to disastrous results which Congress did not contemplate. The Court stated in its opinion, Mr. Justice Woods delivering the opinion, that all the laws with respect to the jurisdiction of the Circuit Courts, which were in force December 1, 1873, were reproduced in Section 629 of the Revised Statutes, under twenty distinct heads, eighteen of which had reference to jurisdiction in civil cases, and that in sixteen of these eighteen, the jurisdiction is conferred without reference to the amount in controversy. The Court enumerates these various subdivisions, and among others mentions the following:

> "In all suits at common law or in equity, arising under the patent or copyright laws of the United States."

In concluding its opinion, the Court says, at Page 107:

> "The act of 1875 confers jurisdiction on the Circuit Courts only in cases where the matter in dispute exceeds $500. If that act is intended to supersede previous acts conferring jurisdiction on the the Circuit Courts, then those courts are left without jurisdiction in any of the cases above specified where the amount in controversy does not exceed the sum of $500, and in several classes of cases, for instance, suits arising under the *patent or copyright laws* neither the Circuit nor District Courts of the United States would have jurisdiction when the amount in controversy is less than $500. But by Rev. Stat. Section 711, par 5, the jurisdiction of the State courts in cases arising under the patent and copyright laws is excluded. Therefore, when the matter in dispute in a case arising under these laws is less than $500, if we yield to the contention of

plaintiffs, it would follow that no court whatever has jurisdiction. *A construction which involves such results was clearly not contemplated by Congress.*

The Act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases, and over particular subjects. Third Nat. Bank of St Louis v. Harrison, 3 McCrary, 162.

Its purpose was to give to the Circuit Courts a jurisdiction which the Federal Courts did not then possess, by enlarging their jurisdiction in suits of a civil nature at common law or in equity, and not to take away from the Circuit or District Courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long a time been vested exclusively in the District Courts. Price v. Abbott, 17 Fed. Rep., 506."

If, then, this Court has held that the Act of March 3, 1875, did not affect jurisdiction in patent cases for the reasons above given, the same argument applies to the Acts of 1887 and 1888, which are mere amendments of the Act of 1875. These latter Acts, by amendment, raised the jurisdictional amount to $2,000 from $500 in the class of cases provided for in Section 1. These latter Acts did not, and were not intended to, affect prior statutes respecting the jurisdiction of the Circuit Court in patent cases. In United States vs. Mooney, the construction contended for there would have ousted the Circuit Courts of jurisdiction in certain patent cases as well as every other court, unless the amount in dispute was over $500, and the Court said: "The construction which involves such results was clearly not contemplated by Congress."

A construction of the Acts of 1887 and 1888, such as is contended for by the defendant company in the present case, would bring about the result that no court whatsoever would have jurisdiction in a patent case in that large class of cases where the infringer is a non-resident alien, or foreign corporation.

Can it not be equally said that "a construction

which involves such a result was clearly not contemplated by Congress?"

The Acts of 1887 and 1888 do not state in express terms that any of the said eighteen subdivisions of Sections 629 of the Revised Statutes, giving jurisdiction in civil cases to the Circuit Courts, are repealed.

The defendant company, however, by its construction of these acts insists in effect that such acts by implication do repeal Subdivision 9 of Section 629 of the Revised Statutes to the same extent as if the Acts of 1887 and 1888 had read as follows:

> "Subdivision 9 of Section 629 of the Revised Statutes so far as it authorizes suits in patent cases against aliens or corporations created by the Laws of States without the United States, is hereby repealed and no patent suit shall hereafter be brought in any Circuit Court against such aliens or foreign corporations."

As the Circuit Courts have exclusive jurisdiction over patent cases, this would mean that no suit whatsoever of this character could be brought in any court.

In United States vs. Mooney, *supra*, this Court held that because the construction of the Act of 1875 contended for, would debar the Circuit Court of jurisdiction in patent cases, unless the amount of $500 was involved, that Congress could not have intended this.

And yet, even under the construction there contended for, all patent cases involving over $500 could be still prosecuted.

The present case is still stronger. If the construction contended for by the defendant company is to prevail, no patent suit whatsoever can be prosecuted in any court by citizens of the United States against foreign States, citizens or subjects whether the amount involved be under or over $2,000.

The reasons assigned, therefore, in the case of United States vs. Mooney, apply with additional force to the present case, namely, the Congress could never have intented any such result.

Furthermore, an examination of the amending Acts of 1887 and 1888 will disclose that on the face of these acts no such construction can prevail.

In the first part of Section 1 of the Act of 1888, jurisdiction is conferred on the Circuit Courts in *all* suits of a civil nature in law or equity, in controversies between citizens of a state on the one side and foreign states, citizens or subjects on the other side, where the amount involved is over $2,000.

A suit, where the amount involved is alleged to be over $2,000, is thus authorized to be brought by a citizen against such foreign states, citizens or subjects. There is no limitation except in amount. Now assume a suit in a case where the jurisdiction of the Circuit Court is not exclusive and in which the jurisdiction of the Circuit Court is not founded only on diversity of citzenship. Under the construction contended for, then, such a suit which is expressly authorized by the first part of this section, could not be brought at all. It could not be brought either in the district of the residence of the plaintiff or defendant under the exception, because jurisdiction is not founded only on the fact of diversity of residence. It must, then be brought in the district in which the *foreign state*, the *foreign* citzen or the *foreign* subject is an inhabitant and hence as such defendants are foreigners and do not reside in the United States, it follows that the act legislates such suits out of court and into the courts of foreign countries, over which courts the Congress of the United States has no control.x

Such a view is manifestly absurd. It is equally absurd to suppose that Congress intended to con-

x See appendix p. 41.

fer full jurisdiction over such suits by the first portion of this section and then in the latter part to take it away.

The true construction is manifestly that Congress did not intend to stultify itself. The section should be so construed as to make it operative as a whole. The clause as to inhabitancy should be applied to persons and corporations who could be inhabitants. It would be folly to authorize suits against foreign states and persons who are manifestly not inhabitants, and then provide that because they are not inhabitants, no suit can be brought.

The true explanation of the dropping of the words "inhabitant of the United States" used in R. S., 739, would seem to be this:

In passing the Act of 1875, the provision was retained that a defendant could be sued in the district which he inhabited or in which he was found. The words, "inhabitant of the United States," in view of this, were tautological and thus the words, "any person," were substituted.

Congress had in mind inhabitants of the United States in passing the Act of 1875. It was implied in the very legislation itself and the change to the words, "any person," made no change in the jurisdiction. Foreign corporation or aliens could be sued

In passing the laws of 1887 and 1888, which were manifestly intended to be mere amendments of the Act of 1875, Section 1 of the Act of 1875 was retained so far as possible, and the words, "any person," were retained with other words of said section. The Act shows on its face an intention to allow suits against inhabitants and non-inhabitants. The framers of the law, however, in striking out the clause authorizing a suit where a defendant was found, did not apprehend that the words, "any person," had been substituted under a law-

which gave them the same effect, so far as jurisdiction is concerned, as the previous words, "inhabitant of the United States," in a prior statute and that such words, "any person," taken in connection with the word "inhabitant" *alone* might tend to restrict instead of enlarge the powers of the Circuit Court.

This was manifestly an inadvertency. It was something not within the contemplation of Congress and is at variance with the whole scheme of the various statutes which we have quoted.

The explanation which we submit is a reasonable one. The object of the Act of 1875 was an enlargement, not a restriction, of jurisdiction; that is an enlargement of the jurisdiction of the Circuit Courts to cover an additional class of cases. This was equally the object of the acts of 1887 and 1888, so far as retaining these additional classes of cases. The only restriction intended was in the amount requisite for jurisdiction. It was doubtless also a further intention of Congress to provide that a citizen of the United States should not be harassed by suits in a district where he did not reside except in cases in which the jurisdiction was founded only on the diversity of residence.

While we admit that the Congress of the United States is not bound to confer on the Circuit Courts all the judicial powers granted in the Constitution.

> Randall vs. United States, 12 Peters, 524.
> Carey vs. Curtis, 3 Howard, 245.
> Sheldon vs. Sill, 8 Howard, 449.

We nevertheless, contend that in the present case it is clear that Congress did intend to enlarge the judical power of the Circuit Courts and to retain in effect the various prior statutes conferring jurisdiction, as well as to add to them additional grounds of jurisdiction.

The construction contended for would not only prevent suits on patents and copyrights against foreign states, citizens or subjects, but also suits against such defendants under various other subdivisions of section 629 of the revised statutes.

The acts of 1887 and 1888 should, then, have a reasonable construction in view of the history of these various laws. No other construction would be reasonable except a construction which retains, in the Circuit Court, jurisdiction over alien corporations in patent suits.

We contend, therefore, that an alien corporation under the laws as they now exist, for the purposes of a suit, must be an inhabitant of any district where it has an agent and a place of business, where the company is represented and does business, and where the company enjoys the protection of the laws of the state and of the United States.

The decision of this Court in the case of Shaw vs. The Quincy Mining Company, 145 U. S., 444, was to the effect that the defendant there must be sued in a particular district rather than some other district. The decision left the plaintiff with the ability to sue, if only he should go to the state where the defendant was organized and to this extent the Federal Courts were still open to him. This was no great hardship. A very different question is the present one. A decision that the defendant company can only be an inhabitant of Germany is a decision absolutely closing the doors of all of our State and Federal Courts in every district to a citizen who would sue the defendant company or any other alien corporation, state, citizen or subject, for infringement of a United States patent, even though the infringement occurred in this country under the laws of which the patentee is granted protection.

head rather than where the body is—that is, where the actual responsible managers do the business, and where the books are kept, rather than where some of the property lies, and where the longshoremen wheel their trucks.

Not only was the company an inhabitant of the Southern District of New York, but the service made there was sufficient to bind the company to appear. It is not disputed that the defendant company had its offices in New York City; that its agents were Kunhardt & Company; and that in the office of such agents the usual monetary and financial transactions of the company were conducted.

Here was clearly the case of an agent, or, at least, a local agent of a corporation, and it has been held that service upon such an agent will bind the company.

The injustice of exempting corporations from liability to be sued in the place where they do business or have agents is well shown by the opinion of Mr. Justice Field in the case of St. Clair v. Cox, 106 U. S., 355. Although this case arose out of different facts than those in the present case, the reason for the rule laid down applies very strongly to cases of *European* corporations, that endeavor to avoid any responsibility in any part of the whole United States.

> "This doctrine of the exemption of a corporation from a suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the Legislature of several States, inter-

posed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence: and they may be authorized to act for it without, as well as within, the State. There would seem, therefore to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions."

See also *ex parte* Schollenburger, 96 U. S., 369.

Furthermore, at the time of service of the writ of subpoena herein, the statutes of the State of New York, provided for service on foreign corporations by the serving of process upon a cashier, director, or managing agent within the state.

Code of Civil Procedure, Section 432, Subdivision 3.

That Messrs. Kunhardt & Company were such agents as could be so served, see

Tuchband vs. R. R. Co., 115 N. Y., 437.
Palmer vs. Pennsylvania Railroad Co., 35 Hun, 369; 99 N. Y., 679.
Hiller vs. Railroad, 70 N. Y., 224.
Pope vs. Manufacturing Co., 87 N. Y., 137.

McCulloh vs. Paillard Co., 38 State Rep., 406.
Rochester Railroad Co. vs. Erie Railroad Co., 48 Hun, 190, 192.

Messrs. Kunhardt & Company are admittedly agents who had moneys and property of the defendant in their possession and transacted financial business for the defendant. Their office was the office of the company and they clearly were agents of such a character that the defendant company would, through them, receive notice of all proceedings begun [as it did in this case.] Messrs. Kunhardt & Company were clearly cashiers and agents within the meaning of the statutes.

The statutes of New York also provided that foreign corporations could sue in the Courts of that state.

Code of Civil Procedure, Section 1779; and could be sued by a resident of the State for any cause of action.

Code of Civil Prodedure, 1780.

The United States Courts have held that when a foreign corporation has an office and does business by agents in a State, under the laws of which the foreign corporation can be sued by service upon such agent, that then, in the United States Courts where a similar service be made upon the agent, the service will be deemed to bind the corporation.

St. Clair vs. Cox, Supra.
Hayden vs. Androscoggin Mills, 1 Fed. Rep., 93.
R. R. Co., vs. Harris, 12 Wall., 65.
Packing Co., vs. Hunter, 7 Rep., 455.
Williams vs. Transporation Co., 14 O. G., 523.
Moch vs. Insurance Co., 10 Fed. Rep., 696.

Block vs. R. R. Co., 21 Fed. Rep., 529.
See Newby vs. Manufacturing Co., 7 Q. B., 293.

VIII.

The bill should not have been dismissed upon motion.

If it is to be held that the defendant, as a foreign corporation, is not amenable to process in any Federal court, then, of course, it makes no difference whether the point is raised on motion or upon a trial. But if the decision is to turn upon whether the Southern District of New York, or some other district, is the proper one, then it is unjust to the complainant to decide it upon motion.

If the question is to turn upon the character of the business done in the two places, or upon the character of the agency of the individual defendants for the Company, &c., the complainant has virtually had no opportunity to meet the case.

The complaint alleges that the defendant The Hamburg American Packet Company, is an inhabitant of the City of New York and has its principal office there. If those allegations are material, and are to be contested, they should be contested by answer just as much as the allegation that the complainant is the owner of the patent. Otherwise the case is virtually a trial on affidavits. The complainant has had no opportunity of cross examination, and, in fact, no opportunity to learn the real facts, which are altogether in the possession of the defendants.

The degree of uncertainty attaching to such a

method of trying the case is illustrated by an allegation in one of the defendant's affidavits (fol. 41), that "said Company advertises that it has an office in the City of New York," while in another of defendant's affidavits the contradictory statement is made (fol. 29) that, "up to the time of the commencement of this cause, said Company had never had an office in the City of New York."

IX.

The petition should be granted and a mandamus should issue as prayed for in the petition.

Charles M. Clemond
of Counsel.

Again, an alien is not a citizen of a state within the meaning of the proviso in Section 1 of the Act of 1887. So held in Denton vs. International Co., 36 F. R., 3, a suit in which plaintiff was an alien, a citizen of Mexico. The proviso refers solely to citizens of the United States by birth or naturalization. Scott vs. Sanford, 19 How., 393; U. S. vs. Cruikshank, 92 U. S., 542; R.R. Co. vs. Koontz, 104 U. S., 12. Now, under the first part of Section 1 of the Act of 1888, an action brought by a citizen of New York against an alien corporation to recover, say, $10,000 damages for a personal injury, is expressly authorized, but under the proviso the action cannot be brought in New York State where the plaintiff resides, because an alien is a party (Denton v. International Co., supra.) Under the construction contended for it must then be brought in the district of the United States of which the defendant is an inhabitant, and, as the defendant is an alien corporation and not a citizen of the United States, the action previously authorized cannot be brought at all in a U. S. Court. Can this be law?